

Transcript of Proceedings

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN BRANDS, INC.,
Plaintiff,

v.

Civil Action

No. 3517-69

NATIONAL ASSOCIATION OF BROADCASTERS,
COLUMBIA BROADCASTING SYSTEM, INC.,
NATIONAL BROADCASTING COMPANY, INC.,
AMERICAN BROADCASTING COMPANIES, INC.,
FEDERAL TRADE COMMISSION AND COMMISSIONERS,
Defendants.

Deposition of PHILIP H. COHEN

Washington, D.C.
22 December 1969

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NATION-WIDE COVERAGE

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN BRANDS, INC.,
245 Park Avenue,
New York, New York, 10017,

Plaintiff,

vs.

NATIONAL ASSOCIATION OF BROADCASTERS,
1771 N Street, Northwest,
Washington, D.C., 20036;

COLUMBIA BROADCASTING SYSTEM, INC.,
2020 M Street, Northwest,
Washington, D.C., 20036;

NATIONAL BROADCASTING COMPANY, INC.,
1725 K Street, Northwest,
Washington, D.C., 20006;

AMERICAN BROADCASTING COMPANIES, INC.,
1124 Connecticut Avenue, Northwest,
Washington, D.C., 20036;

FEDERAL TRADE COMMISSION, PAUL RAND DIXON,
PHILIP ELMAN, MARY GARDNER JONES, and
A. EVERETTE MacINTYRE,
Washington, D.C., 20580;

Defendants.

Civil Action

No. 3517-69

Deposition of PHILIP H. COHEN

Pennsylvania Suite,
Mayflower Hotel,
Washington, D.C.

Monday, 22 December 1969

CONFIDENTIAL: MINNESOTA TOBACCO LITIGATION

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Deposition of PHILIP H. COHEN, called for examination by agreement of counsel, at 1:40 p.m., before Mrs. Dora M. Bartner, Notary Public in and for the District of Columbia, when were present on behalf of the respective parties:

ON BEHALF OF PLAINTIFF:

ABE KRASH, Arnold & Porter, 1229 Nineteenth Street, Northwest, Washington, D.C., 20036.

Of Counsel:

CYRIL F. HETSKO, Senior Vice President and General Counsel, American Brands, Inc., 245 Park Avenue, New York, New York, 10017;

ARNOLD HENSON and DANIEL J. O'NEILL, Chadbourne, Parke, Whiteside & Wolff, 25 Broadway, New York, New York, 10004;

EUGENE R. ANDERSON, 345 Park Avenue, New York, New York, 10022;

JOHN D. HANKE, JR., MELVIN D. SPAETH, JEROME I. CHAPMAN, NORTON F. TENNILLE, JR., 1229 Nineteenth Street, Northwest, Washington, D.C., 20036.

ON BEHALF OF DEFENDANTS:

LEE LOEVINGER and HOGAN & HARTSON, 815 Connecticut Avenue, Northwest, Washington, D.C., 20006, On behalf of the National Association of Broadcasters.

PAUL COMSTOCK and JOHN SUMMERS, 1771 N Street, N.W., Washington, D.C., 20036; on behalf of the National Association of Broadcasters.

TIMOTHY B. DYK, J. ROGER WOLLENBERG, RAYMOND C. CLEVERICE III, and SALLY KATZEN, Wilmer, Cutler, & Pickering, 900 Seventeenth Street, N.W., Washington, D.C., 20006; on behalf of the Columbia Broadcasting System, Inc.,

ELEANOR S. APPLEWHITE, Senior Attorney, Columbia Broadcasting System, Inc., 51 West 52 Street, New York, New York, 10019.

MATTHIAS E. MONE and LAWRENCE J. MCKAY, Cahill, Gordon, Sculth, McIndel & Ohl, 1819 H Street, Northwest, Washington, D.C., 20006; on behalf of the National Broadcasting Company, Inc.

HOWARD ADLER, JR., Bergson, Borkland, Margolis &
Adler, 888 Seventeenth Street, Northwest,
Washington, D.C., 20006; on behalf of the
American Broadcasting Companies, Inc.

NATHAN DODELL, Assistant U. S. Attorney,
U.S. Courthouse, Washington, D.C., 20001;
HAROLD D. RHYNDANCE, JR., Federal Trade Commission,
Washington, D.C., 20580; and
ALVIN L. BERMAN, Federal Trade Commission,
Washington, D.C., 20580;
on behalf of the Federal Trade Commission
and Commissioners.

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C O N T E N T SWITNESS:DIRECTCROSSREDIRECTRECROSS

Philip H. Cohen

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EXHIBITS:FOR IDENTIFICATION

American Brands Exhibits 9-34

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NAB Exhibit 35

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NAB Exhibit 36

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CBS Exhibit 8

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CRC 1P R O C E E D I N G S

MR. LOEVINGER: Mr. Krash, you have delivered to the defendants this morning a group of some 26 documents which were in response to defendants' request made by Mr. Bergson. I have asked the reporter to mark those NAB Exhibits Nos. 2 through 34 respectively, and if there is no objection I will ask her to include at this point in the record a list of the exhibits with the numbers and identifying phrases that you have given them.

Is that agreeable?

MR. KRASH: Yes. My understanding is these may be referred to in the same manner as all of the other exhibits which have been introduced. That is, it is agreed they are authentic, but all parties reserve the right to object to their admissibility. But we may all deem them to be otherwise competent.

MR. LOEVINGER: Well, my understanding was that we had waived the making of a technical foundation, reserving all rights to object on grounds of relevancy, materiality, legal effect and competence other than the laying of a foundation.

MR. KRASH: Yes, correct.

MR. LOEVINGER: I take it that that agreement applies to all of the documentary exhibits that have been and are being offered in these depositions.

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1 Is that agreeable?

2 MR. KRASH: That is correct.

3 (The documents referred to above were marked
4 for identification as follows:)

5 9. Letter of Stockton Helffrich to Philip H.
6 Cohen, dated April 14, 1967.

7 10. Memorandum from M. J. O'Neill to William J.
8 Moore, dated October 18, 1967.

9 11. Letter of Warren Braren to Shelton B. Sosna,
10 dated April 4, 1968.

11 12. Letter of William E. Schulte to Frank Reed,
12 dated December 13, 1968.

13 13. Letter of Frank J. Reed to William E.
14 Schulte, dated December 17, 1968.

15 14. Letter of Corey M. Allen to Warren Braren,
16 dated December 26, 1968.

17 15. Letter of Warren Braren to Corey M. Allen,
18 dated January 30, 1969.

19 16. Letter of Corey M. Allen to Stockton
20 Helffrich, dated February 26, 1969.

21 17. Letter of Stockton Helffrich to Alfred
22 J. Seeman, dated March 3, 1969.

23 18. SSC&E Contact Report of meeting between Corey
24 Allen and William Moore, dated March 13, 1969.

25 19. Letter of Stockton Helffrich to Alfred J.

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cm3 1 Seaman, dated March 28, 1969.

2 20. Letter of Alfred J. Seaman to Stockton

3 Helffrich, dated April 9, 1969.

4 21. Letter of Stockton Helffrich to Corey M.

5 Allen, dated April 16, 1969.

6 22. Letter of Corey M. Allen to Stockton Helffrich,

7 dated April 25, 1969.

8 23. Letter of Stockton Helffrich to Corey M. Allen,

9 dated May 14, 1969.

10 24. Letter of Percy F. Smith to Leighton Saville,

11 dated August 13, 1969.

12 25. Memorandum of Percy F. Smith to E. J. Going,

13 dated August 20, 1969.

14 26. Letter of Eugene O'Doherty to Mike Bishof,

15 Jr., dated June 17, 1969.

16 27. Letter of William B. Moseley to Jack Nugent,

17 dated July 21, 1969.

18 28. Letter of George A. Rojas to John J. Nugent,

19 dated September 10, 1969.

20 29. Letter of Eugene O'Doherty to Mike Bishof,

21 dated September 11, 1969.

22 30. Memorandum-letter of George A. Rojas to John J.

23 Nugent, dated October 3, 1969.

24 31. Letter of Corey M. Allen to William J. Moore,

25 dated December 3, 1969.

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32. Memorandum of William J. Moore to Cyril F. Hetsko, dated December 4, 1969.

33. Memorandum of William J. Moore to Robert K. Heinmann with attached letter of Cynithia Fates to Percy F. Smith, dated December 11, 1969.

34. Memorandum of William J. Moore to Robert K. Heinmann and Cyril F. Hetsko, dated December 2, 1969..

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MR. LOEVINGER: Before the noon recess we had some discussion concerning affidavits and there was some talk of advising by, was it Saturday noon --

MR. KRASH: Yes, I believe so.

MR. LOEVINGER: Of any affidavits that would be proffered. I at least did not then have in mind the rule which requires that on motions for a preliminary injunction affidavits in support thereof be served with the motion for the injunction, and no latter than five days in advance of the hearing.

We do not waive that rule and we will probably object to any affidavits that are offered on the grounds that they are contrary to the rule. We will probably object and reserve the right to object also to any affidavits that may be offered on the grounds that the opportunity having been given to depose witnesses, the offering of their testimony by way of affidavit at the time of the hearing is

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cmc5 1 inappropriate.

2 MR. KRASH: Nothing that you have said, of course,
3 is to in any way indicate my agreement with your statement
4 of what the rule is, which I most emphatically do not agree
5 to be the rule and which I think the practice in the District
6 is quite the contrary, that affidavits are submitted by the
7 parties at the time of the preliminary injunction. But
8 you have your rights and we have ours.

9 MR. LOEVINGER: Yes, I didn't want to mislead you
10 into believing that anything we said was an indication of
11 waiving that rule.

12 MR. KRASH: I understand that you are not with-
13 drawing from your agreement to serve us with any affidavits
14 you will file on Saturday and that you expect us to
15 adhere to our agreement. Is that correct?

16 MR. LOEVINGER: That is correct.

17 At the moment we have no present intention of
18 offering affidavits, particularly of witnesses who have been
19 deposed. We don't expect we will have to serve you with any-
20 thing.

21 WHEREUPON,

22 PHILIP H. COHEN

23 was called as a witness and, having been first duly sworn,
24 was examined and testified as follows:
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DIRECT EXAMINATION

BY MR. LOEVINGER:

Q Will you state your full name and address?

A Philip H. Cohen. I live at [DELETED]

Q What is your business address, Mr. Cohen?

A The American Tobacco Company, 245 Park Avenue,
New York City. A division of American Brands.

Q Is that a fully organized and operating subsidiary
corporation, do you know?

A I am sorry.

Q Is American Tobacco Company a subsidiary of
American Brands?

MR. KRASH: No, it is a division. It is a non-
corporate division.

MR. LOEVINGER: Thank you.

BY MR. LOEVINGER:

Q American Brands was formerly known as American
Tobacco Company, was it not?

A That is correct.

Q What is your position in the company?

A I am the director of advertising of the American
Tobacco Company.

Q How long have you held that position?

A For five years.

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1 Q What are your responsibilities and authority?

2 A My responsibility is to assemble all of the
3 advertising that supports our cigarette and pipe tobacco
4 brands. I am in charge of the advertising that we get from
5 our advertising agencies. But it is my responsibility to see
6 that it is done and placed in the various media, either
7 print or television and so on, radio.

8 Q Are you responsible for the contents of the
9 advertising as well as the expenditures to have it carried?

10 A I am responsible for the content; obviously
11 the amount spent on advertising is a decision of the top
12 management, including the chairman of the board and the
13 president. The allocation of funds to advertising.

14 Q You are told then by those who are superior in the
15 corporate organization of the advertising budget?

16 A That is correct.

17 Q How long in advance is that planned?

18 A We try to plan a year in advance. Sometimes the
19 final decisions as to where various media will be are made
20 late in the year. But we try to plan for a year ahead.

21 Q Who is your immediate superior in the corporate
22 organization?

23 A Robert K. Heinmann. He is president of American
24 Brands.

25 Q So you are really the top advertising man in the

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1 organization as far as cigarettes are concerned?

2 A That is correct.

3 Q I assume that you work through a staff and have
4 those who are in effect subordinates in the corporate
5 organization?

6 A That is correct.

7 Q Will you describe your staff organization and name
8 your subordinates, please?

9 A The basic staff are the product managers who handle
10 specific brands. Mr. William Moore is the manager, marketing
11 manager of Pall Mall -- do you want the names of all of
12 these people and their brands?

13 Q Yes, please.

14 A There is Mr. Michael Bishof, who is product manager
15 for Silva Thins.

16 Mr. Donald Dugan is product manager for Lucky
17 Strike, Carlton, and Tarryton.

18 Mr. John Nugent is product manager for new products
19 and these are products that are in test market. I think
20 that is the list, aside from the usual secretarial help,
21 things of that sort, which I think would not interest you.

22 Q Surely.

23 Do each of these marketing or product managers
24 have staffs of their own?

25 A No.

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1 Q How do they work?

2 A They work with the advertising agencies. They are
3 the liaison between the American Tobacco Company and our
4 several advertising agencies.

5 Q How long have you worked for American Tobacco
6 Company?

7 A Five years.

8 Q What did you do before that?

9 A Before that I was for 17 years at Sullivan
10 Stauffer Colwell and Bayles, referred to as SSC and B.
11 And I was head of television there.

12 Q That is the agency that is now handling your
13 Pall Mall account, is it not?

14 A That is correct.

15 Q What is the process by which the advertising program
16 is formulated and put into effect?

17 A Are you referring to the creative program,
18 in other words, are you asking how a commercial starts or the
19 whole program?

20 Q Well, how do you start out with your program and
21 how does it work its way down to specific ads?

22 A Well, the first thing is to attempt to get a
23 basic theme and this comes normally from the advertising agency.
24 Then in terms of the television, radio and print openings we
2 have, the material is presented to us by the advertising agency

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and if it acceptable to us, it is put into the channel of communication whether it is print or television or radio.

Q Well, to begin with, I assume you start with a budget, don't you?

A Yes. You start, the budget is -- and that is based on long experience, that you know what you spend one year and from that you calculate what your needs will be for the coming year.

Q Does Mr. Heinmann simply tell you the budget or do you consult with him in the formulation and determination of it?

A No; we discuss it.

Q Then he eventually gives you the decision. Is that correct?

A Yes; correct.

Q Does that decision involve simply saying a lump sum is to be allocated for advertising, or is it divided up among brands?

A It is divided among brands.

Q So there is X dollars for Pall Mall, Y dollars for Silva Thins, Z dollars for Lucky Strikes, and so forth?

A Yes.

Q I take it then that you communicate this to your product managers, who in turn communicate it to the advertising

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11 1 agencies. Is that right?

2 A That is right.

3 Q Then the advertising agencies go to work and
4 formulate a program designed to use that amount of money
5 in a manner that they think appropriate?

6 A That is right.

7 Q They bring the ads back to you for approval. Is
8 that right?

9 A That is right.

10 Q At what point in the formulation of the advertising
11 copy and program are the ads brought back to you?

12 A They are brought back at different stages,
13 Mr. Loevinger. Sometimes an agency will be working on an
14 ad and bring it in in rough form and discuss it, and if
15 everybody is in agreement that it is the proposed ad, it is put
16 into finished form, whether it is a print ad or ready for
17 television, this put on film.

18 Q In any event, it does come back up through your
19 channels of communication before it is actually put into finished
20 form?

21 A That is right.

22 Q Now according to the complaint in this case the
23 gross sales of cigarettes of the plaintiff company, American
24 Tobacco, now known as American Brands, was over a billion
25 dollars, was over a billion dollars in 1988. I take it that is

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correct, is it not?

A That is correct.

Q What were the gross sales of the company of all products?

A You mean of American Brands, the subsidiaries?

Q American Brands and all of the subsidiaries?

A I am sorry; I don't know, Mr. Loevinger.

Q What other products besides cigarettes does the company sell?

A There is the Jim Beam Liquor Company, Sunshine Biscuits, Duffy-Mott -- I think that is all.

Q What was the last one?

A Duffy-Mott. They make apple juice and prune juice.

Q The American Tobacco Company is a rather old company ksn't it?

A Yes, it is.

Q Do you have any idea how old it is?

A Well, in the various forms, I guess, I would guess 75 years old. I should have brought my little booklet, but I didn't. I think of it as 75.

Q When were these other businesses, Jim Beam Liquors, Sunshine Biscuits, and Duffy-Mott, acquired, if you know?

A I don't know the years. May I say that I have nothing to do with these companies. My sole activity is in the

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cmcl3 1 American Tobacco Company. So that I don't want you to think
2 I am withholding anything. I simply don't know.

3 Q We wouldn't suspect you of that, Mr. Cohen.

4 A Thank you.

5 Q Were these other businesses acquired during the
6 period that you have been with the company?

7 A Yes. Excuse me, I am trying to think now.
8 The Jim Beam date, I believe it was within that period but
9 I am not positive on Jim Beam.

10 MR. LOEVERING: Does anyone here know what the gross
11 sales of American Brands in 1968 was?

12 MR. KRASH: I don't know.

13 MR. LOEVERING: All right.

14 BY MR. LOEVERING:

15 Q When was the name changed from American Tobacco
16 Company to American Brands, by the way?

17 MR. KRASH: Effective as of July 1, 1969.

18 MR. LOEVERING: Thank you.

19 BY MR. LOEVERING:

20 Q The complaint also alleges that in 1968 the total
21 sales of Fall Mall Golds was approximately \$83 million.
22 Is that correct?

23 A That is correct.

24 Q And that the gross sales of Silva Thins was
25 approximately \$17 million. Is that correct?

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1 A That is correct.

2 Q I assume that in the administration of the advertis-
3 ing department, Mr. Cohen, that you attempt to keep well
4 information concerning all applicable laws, regulations,
5 policies and similar matters, do you not?

6 A As they affect our advertising, yes.

7 Q Do you make any attempt to follow the FTC guides,
8 policies, statements and decisions?

9 A No; I have not.

10 Q You have no established procedure for keeping up
11 to those?

12 A No. If any information on any matter would
13 come, it would come formally through the advertising agency,
14 which has initiated the placement of the material.

15 Q You rely entirely on the advertising agencies to
16 keep you in compliance with FTC policies and guides with
17 relation to your advertising then?

18 A That basically, but I don't think we would be
19 aware of any statements, I would think, from one source or
20 another.

21 Q What are the sources from which you might become
22 aware of FTC statements, policies or guides?

23 MR. KRASH: Are you speaking of him personally
24 now?

25 MR. LOEVINGER: You personally, yes.

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1 THE WITNESS: Well, if there were a direct com-
2 munication from some source, that would come to me if it
3 affected the kind of advertising that I was doing, clearing
4 or possibly from reading in the press, I don't know.

5 I don't have any regular channel of communication
6 except through our agencies basically.

7 Q Is the same thing true as to the Federal Communi-
8 cations decisions, orders and statements?

9 A Yes.

10 Q Do you make any effort to keep up with the
11 provisions of the NAB code?

12 A As they are brought to our attention, and
13 affect our business. I don't follow code activities generally.

14 Q Do you get the NAB Code News?

15 A It is not sent to us. I have received it on occasion
16 when something was in it affecting cigarettes, in a special
17 effort. But I don't get this regularly and I don't
18 believe anybody in the company does.

19 Q You have never requested it, I take it, is that
20 correct?

21 A No.

22 Q Is American Tobacco Company a member of the
23 Tobacco Institute?

24 A No, it is not.

25 Q You were a member of the Tobacco Code organization

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at one time, were you not?

A That is correct.

Q But you are no longer?

A We are not.

Q You said you do keep up somewhat with this sort of thing through the newspapers and trade press, I take it?

A Yes.

Q What newspapers do you read regularly?

A New York Times, New York Daily News, New York Post, that is about all we have left.

Q How about the Wall Street Journal?

A Yes.

Q Do you read any magazines or trade publications that are relevant to this case?

A I read Advertising Age, and Broadcasting Magazine.

Q Any others that you think of?

I am not asking about your personal habits except as they are relevant here.

A Sure, I understand. I can't think of anything else.

Q Do you watch TV?

A When our commercials are on.

Q How do you know --

A I am not an avid watcher.

Q How do you know when that is going to be?

A We have a schedule of times and shows that are

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definitely committed for specific time periods on specific shows.

Q Do you listen to radio?

A Not very much. I listen to the news in the morning, and that is about the extent of it.

Q You have some commercials on radio, don't you?

A We have very little. As of the moment, I did not bring my current schedule, but I don't believe we have any radio on currently, except in Hawaii, I believe, for Pall Mall Menthol. But I don't believe we have radio on now in any brand.

Q You regard radio advertising as unimportant at the present time?

A Not totally unimportant, but your dollars go only so far, and they didn't go that far.

Q Are any of the ads of the kind we are discussing in this case involved in radio?

A No.

Q So this case involves only television then, is that correct?

A Yes.

Q Do you ever look at the advertising of other cigarettes or cigarette companies?

A Yes.

Q Do you make an effort to observe the competition,

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as it were?

A Yes.

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Q How frequently are you in communication with your advertising agencies?

A Well, I am in communication with them on an off and on basis. The daily communication is done through the product managers. So I can't tell you exactly how often. When we have a major presentation or campaign, it is presented to me by the agency and that happens whenever there is something to present or consider.

Q If any --

A So I met with them many times over the course of a year.

Q Don't let me interrupt, if I cut off an answer just say so.

A No, that is all.

Q Are your product managers in daily communication with your advertising agencies?

A I wouldn't say daily. It is on a regular basis, but if the campaign is running, and there are no problems, there could be stretches when there would be no communication. I can't tell you how long they are. They vary with the longevity of the campaign. But it is on a regular, fairly regular basis.

Q Regular and continuous.

A I would say so.

Q If a significant problem arises are you advised?

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1 A Yes.

2 Q Are you consulted when there is any change in an ad?

3 A Yes.

4 Q Norman Craig & Kummel is the advertising agency for
5 Silva Thins, is it not?

6 A That is correct.

7 Q Do you know how long they have been handling the
8 Silva Thins advertising?

9 A Approximately two years. I don't know the exact
10 dates.

11 Q Silva Thins, according to the complaint, were
12 introduced in September 1967. Is that correct?

13 A Well, let me just say they have had it since we have
14 had the account, so that is the date. September 1967.

15 Q Paragraph 11 of the complaint, Mr. Krash.

16 THE WITNESS: That is correct.

17 BY MR. LOEVINGER:

18 Q And NC&K has been handling it since then?

19 A Yes.

20 Q Do they handle any other advertising for your
21 company?

22 A No.

23 Q Are they fully authorized to represent your company
24 in dealing with the networks, the NAB Code and other agencies
25 concerning this advertising?

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A Would you say that again?

(The Reporter read the pending question.)

THE WITNESS: They are authorized to deal with the companies subject to our approval.

BY MR. LOEVINGER:

Q You came from Sullivan, Stauffer, Colwell & Bayles you testified. I take it that at that time American Tobacco was then using SSC&B for advertising, was it?

A Yes. For Pall Mall.

Q Do you know how long SSC&B has represented American Tobacco?

A Since 1948.

Q Have they had the Pall Mall account during that period?

A That was the Pall Mall Red, the regular cigarette.

Q I'm sorry?

A That was the Regular Pall Mall non-filter brand in '48. There was of course no filter until 1964.

Q Well, what advertising does SSC&B handle for your company?

A They handle all of the Pall Mall advertising, and they are working on test brands which have not appeared on the market.

Q Do they handle anything besides Pall Mall?

A Except that they handle the test brands. No, not

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any of the other brands.

Q So SSC&B represents the company with respect to Pall Mall advertising as Norman Craig & Kummel does with respect to Silva Thins.

A That is correct.

Q Now the complaint refers to Pall Mall Golds which it says were introduced in 1964.

A Yes.

Q Paragraph 10. What is the difference between Pall Mall Golds and other Pall Mall cigarettes?

A Well, Pall Mall Gold 100s are the filter cigarette, the non-filter is, we call it Pall Mall Red for differentiation. But this is the filter.

Q Do you advertise Pall Mall Red under that name or just Pall Mall?

A We don't advertise it at all.

Q You don't advertise it at all?

A No.

Q Are Pall Mall Golds the only Pall Mall cigarettes you advertise now?

A No, we also advertise the menthol version, which is also in the 100-millimeter length.

Q What do you call them?

A Pall Mall Menthol 100s.

Q Pall Mall Golds then mention Pall Mall Filter 100s,

without menthol. Is that correct?

A That is correct, yes.

Q And there are other Pall Mall brand cigarettes that are not advertised at all?

A Well, it will take me a minute to explain. There are different packages. There is the hardpack in the Gold and the Menthol and we don't advertise that. The one that, the two that are advertised at all are the Pall Mall Gold and a small amount of advertising for the Menthol.

If I may just take a second to make it clear, the Menthol gets in advertising a ride generally on the Regular Filter version. Most companies do it the same way, they advertise the Filter and end up by saying "and Menthol too."

Q What other types of Pall Mall cigarettes are now being manufactured and sold or were in 1968 manufactured and sold by American Tobacco?

MR. KRASH: Other than Pall Mall Gold 100s and Pall Mall Menthol 100s.

THE WITNESS: That is all.

Pall Mall Gold 100s, Pall Mall Menthol and then the Regular Red Non-Filter. That is all.

BY MR. LOEVINGER:

Q The Red Non-Filter Pall Malls?

A Right.

Q Did you advertise them in 1968?

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A No.

Q What were the sales of the Pall Mall Reds in 1968?

A I don't have the Red figures at all. I didn't think that would come up. I'm sorry.

Q Haven't you any idea approximately what they were?

A I don't know the dollar sales. I have something on the --

Q Physical quantities.

A I think on the numbers.

Q Could you give us those?

A I'm very sorry, I don't have it. I have the 100s figures.

Q Were any substantial number of Pall Mall Reds sold?

A Yes.

Q How did the number of Pall Mall Reds sold compare to the number of Pall Mall Golds?

A They sell far more than the Golds.

Q More Pall Mall Reds were sold in '68 than Pall Mall Golds. Is that correct?

A That is correct.

Q And the Pall Mall Reds weren't advertised at all during that year. Is that correct?

A Well, it isn't strictly -- when you are advertising the name, if I may respond to that, the name Pall Mall is kept in front of the people, it is in itself an advertising medium

1 or gives some support. It isn't as if the name were taken
2 out. But it is not that specific item. But the name itself
3 helps.

4 Q Just the effect of advertising the name Pall Mall
5 in the advertising of Pall Mall Golds during 1968 resulted in
6 the sale of more Pall Mall Reds than of Pall Mall Golds. Is
7 that correct?

8 A No. The sale of Pall Mall Red, like all regular
9 cigarettes, has been declining at a very rapid rate. You can
10 only compare it one year to the other.

11 Q I didn't ask you what it did in prior years.
12 I'm comparing Pall Mall Golds and Pall Mall Reds.
13 In 1968 you told me Pall Mall Reds outsold Pall Mall Golds.

14 A In total quantity, yes.

15 Q Despite the fact that in 1968 there was no adver-
16 tising for Pall Mall Reds except insofar as they may have
17 benefited from the advertising of the name Pall Mall? Is that
18 right?

19 A Yes, sir.

20 Q Now in paragraph 10 of the complaint you allege that
21 Pall Mall Golds were introduced in 1964 and that the adver-
22 tising since then has totaled approximately \$75 million. Is
23 that correct?

24 A That is correct.

25 Q And that the advertising in 1969 amounted to

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approximately \$14 million. Is that correct?

A That is correct.

Q What was the advertising for 1968 in dollars?

A It would be about the same amount, \$14 million.

Q What is the advertising budget for Pall Mall Golds for 1970?

A It will be approximately the same amount.

Q What percentage of your advertising was budgeted for broadcasting advertising in 1968?

MR. KRASH: Are you talking about Pall Mall Golds?

MR. LOEVINGER: Yes, I'm sorry.

Pall Mall Golds.

MR. KRASH: You are saying of the amount that was budgeted in 1968, how much was budgeted for broadcasting?

MR. LOEVINGER: I take it in '68 we are talking about the amount that was spent.

THE WITNESS: One of my colleagues is here. Can I consult him a minute and get that figure?

MR. LOEVINGER: Yes.

If my question has misled you, please don't hesitate to correct the facts. We want a correct record.

THE WITNESS: Let me give you the -- and I had not read that carefully. In paragraph 10, it says \$14 million to advertising, Pall Mall Gold or television. That is television only.

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Then in magazines, the figure is approximately \$2 million. And that figure would be comparable in '68.

BY MR. LOEVINGER:

Q '68 about the same.

A Yes.

Q What do you have budgeted for 1970?

A Approximately the same.

Q Now the complaint in paragraph 11 says Silva Thins were introduced in September 1967 and I have a note that it says the advertising since then has totaled approximately \$28 million. Is that television also?

A No, that would be the total.

Q That is the total. And the complaint alleges that approximately \$14 million of that was in 1969. Is that correct?

A That is correct.

Q Do you know how the other half was divided between 1967 and 1968?

A I don't know, I'm sorry.

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Q Approximately what is the distribution between television and the other media for Silva Thins?

A Television is by far the largest part, I would guess, although I don't have the figure, it would be 80 percent.

Q What is your 1970 advertising budget for Silva Thins?

A It would be approximately \$14 million.

Q Is that divided between the media in the same proportion approximately as '69?

A Yes.

Q The complaint alleges that the sales of Silva Thins in 1968 were approximately \$17 million; is that correct?

A That is correct.

Q What were the sales of Silva Thins in 1969?

A I am sorry, I don't have that figure with me.

MR. LOEVINGER: Can anyone give us that figure?

MR. KRASH: We don't have that here.

BY MR. LOEVINGER:

Q You have no idea what the sales were?

MR. KRASH: Dollar sales of Silva Thins?

MR. LOEVINGER: Yes.

THE WITNESS: I would think it would be about the same.

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1 BY MR. LOEVINGER:

2 Q About \$17 million?

3 A Yes.

4 Q Do you have any sales projections for Silva Thins
5 for 1970?

6 A No, we don't.

7 Q I take it it costs you something to manufacturer
8 cigarettes, doesn't it?

9 A Yes, it does.

10 Q Do you have any idea what it costs either in terms
11 of the proportion of total selling cost or cost per cigarette?

12 MR. KRASH: No, don't answer.

13 MR. LOEVINGER: Just a minute. Damages are in
14 issue here.

15 MR. KRASH: Not under the preliminary injunction.
16 We are talking about irreparable damages in terms of loss. Not
17 our manufacturing costs; they are not in issue here.

18 BY MR. LOEVINGER:

19 Q Approximately how many cigarettes does \$17 million
20 worth of sales represent, Mr. Cohen?

21 MR. KRASH: What is the question?

22 BY MR. LOEVINGER:

23 Q Approximately how many cigarettes does \$17 million
24 worth of sales represent?

25 MR. KRASH: You mean in unit sales?

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1 MR. LOEVINGER: I don't care; packages or cigarettes.

2 MR. KRASH: Are you talking about packages? Units?

3 What?

4 MR. LOEVINGER: I asked him how many cigarettes.

5 MR. KRASH: Units?

6 MR. LOEVINGER: Yes.

7 THE WITNESS: This is an estimate: it would be on
8 the order of 4-1/2 billion cigarettes.

9 MR. DYK: Can I just add my objection to Mr.
10 Loevinger's.

11 MR. KRASH: There is no question pending.

12 BY MR. LOEVINGER:

13 Q It costs you something to distribute your cigarettes,
14 doesn't it?

15 A To distribute them?

16 Q Yes, out of your gross sales, at least some pro-
17 portion of that goes to the cost of distribution, doesn't it?

18 A Yes, it does.

19 Q And you have cost of overhead and general admini-
20 stration?

21 A Yes.

22 Q And these costs have to be allocated among your
23 various products?

24 A Yes.

25 Q Now, didn't it cost you more than \$3 million to

1 manufacture, distribute, and sell 4-1/2 billion cigarettes?

2 A This is not an area that I know; I am in the
3 advertising part. This is manufacturing. I just don't know
4 that.

5 Q Don't you attempt to draw any correlation between
6 the amount you spend for advertising and the amount you receive
7 in sales of your products?

8 A I personally don't. The part I know is the adver-
9 tising. There are many departments in the company and this
10 area is not mine.

11 Q Doesn't the question of the profitability of the
12 advertising expenditures every arise in a discussion of
13 advertising budgets?

14 A Yes.

15 Q Don't you attempt to allocate your advertising
16 dollars to the areas where it was thought that they will
17 return profit to the company in sales?

18 A I think the answer to that is, yes.

19 Q How can you do this without knowing what the
20 relationship between sales and advertising dollars is?

21 A Well, somebody is responsible for this, obviously,
22 but this is not my department. I am not pretending ignorance,
23 I just know my function is to get the ads, get them in the
24 media. And how the costs are allocated is somebody else's
25 basic problem.

Q Simply to look at your Silva Thins figures, Mr. Cohen, you are spending \$14 million a year in advertising in order to produce \$17 million a year in sales. Isn't that actually a loss operation?

A When you are introducing a new brand, and this is relatively new, people do spend more on advertising than they get back until the brand is established. This is certainly no secret in any business. This is called investment spending.

But I must answer you, I don't know whether it is close to a breakeven or a loss or not. But I do say that this is standard procedure in launching new products.

Q Just from your knowledge of company operations, isn't it fairly apparent to you that up to now Silva Thins have been a loss operation?

MR. KRASH: Do you know?

THE WITNESS: I don't know, no.

MR. KRASH: All right.

BY MR. LOEVINGER:

Q Give us an informed estimate.

MR. KRASH: Do you know?

MR. LOEVINGER: I am asking him --

MR. KRASH: Just a minute. Do you know if it is a loss?

THE WITNESS: I don't know.

1 BY MR. LOEVINGER:

2 Q On the basis of your years of experience in the
3 advertising business, your five years as a top-ranking
4 executive of American Tobacco Company, isn't it your best
5 estimate that Silva Thins had got to be a loss operation on
6 the basis of the figures that you know?

7 MR. KRASH: Don't answer. Counsel is arguing
8 with the witness. You have answered as best you know.

9 MR. LOEVINGER: You certainly had plenty of argu-
10 ment with our witnesses. Do you refuse to answer that
11 question?

12 MR. KRASH: Is there a question pending?

13 MR. LOEVINGER: Yes.

14 MR. KRASH: The witness answered the question to
15 the best of his knowledge.

16 BY MR. LOEVINGER:

17 Q Are you being harassed, Mr. Cohen?

18 MR. KRASH: The witness said he didn't know, and you
19 are continuing.

20 MR. LOEVINGER: I am asking him for an informed
21 estimate. He is a top official of the company.

22 Can you give me an estimate?

23 MR. KRASH: You don't know, do you?

24 THE WITNESS: I don't know, no.

1 BY MR. LOEVINGER:

2 Q Nobody ever discussed the subject with you in the
3 company?

4 A No, they haven't.

5 Q Nobody has ever told you whether your advertising
6 was producing a profit for this brand; is that correct?

7 A That is correct.

8 Q Has anyone ever suggested to you whether or not
9 termination of advertising for Silva Thins in 1970 will pro-
10 duce a profit or a loss for the company?

11 A Has anybody discussed this with me?

12 Q Yes.

13 A No.

14 Q If you stopped spending \$14 million for advertising
15 in 1970, don't you think that the company would make more money
16 than if it spent it during that year?

17 A I don't think you ever make money by stopping
18 advertising, if that is the thrust of your question. To
19 sell goods you will have to advertise them.

20 Q But for the year 1970, don't you think you would
21 make more money if you didn't advertise Silva Thins at all?

22 A I don't think so.

23 Q Well, you would at least stop the loss, wouldn't you?

24 MR. KRASH: What loss. There is no predicate for
25 that. He is misleading you, Mr. Cohen. There is no evidence

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1 there were any losses.

2 BY MR. LOEVINGER:

3 Q Is there any evidence, Mr. Cohen, that the company
4 has ever made a profit selling Silva Thins?

5 MR. KRASH: You mean to date?

6 MR. LOEVINGER: To date.

7 BY MR. LOEVINGER:

8 Q To your knowledge has the company ever made a profit
9 selling Silva Thins to date?

10 A I don't know.

11 Q Do you know any basis on which to estimate whether
12 or not the company will make a profit selling Silva Thins
13 during 1970?

14 A I don't know.

15 Q You haven't any idea?

16 A No.

17 Q You haven't any idea whether or not the amount you
18 plan to spend for advertising Silva Thins will or will not
19 produce a profit in 1970? Isn't that the case?

20 A Yes, sir.

21 Q Thank you.

22 Now, I take it that despite the somewhat carefully,
23 if I may so describe it, system for the dissemination of
24 information within your company, you are aware of the U. S.
25 Surgeon General's Advisory Committee on smoking and health

1 and the report it issued on January 11, 1964, are you not?

2 MR. KRASH: We object to that. He is obviously
3 here as a witness on advertising; he is not an expert on
4 health, smoking. I realize your witness --

5 MR. LOEVINGER: Your objection is noted.

6 BY MR. LOEVINGER:

7 Q You are aware of this report, are you not?

8 MR. KRASH: Of the publication of it, is that what
9 you are asking him? That there was such a report?

10 MR. LOEVINGER: If the witness doesn't understand
11 the question, I suggest he ask me to clarify it.

12 MR. KRASH: Is your question whether he is aware
13 of the existence of such a report?

14 BY MR. LOEVINGER:

15 Q All right. Are you aware of the existence of such
16 a report, Mr. Cohen?

17 A Yes.

18 Q And were you aware at the time it was issued or about
19 the time it was issued that it was issued?

20 A Yes.

21 Q It was widely reported in the press; you couldn't
22 miss that, could you? Isn't that correct?

23 A Yes.

24 MR. LOEVINGER: Will you mark this as NAB Exhibit

25 35?

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(The document referred to was marked
NAB Exhibit No. 35, for identifi-
cation.)

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1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100

BY MR. LOEVINGER:

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Q Showing you a document marked NAB Exhibit 35, Mr. Cohen, which is the NAB Code News for February 1964, have you ever seen that before?

A No, sir.

Q You never have?

A No.

Q Where were you working in February 1964?

A I was still at SSC&B.

Q What were you working on?

A I was working on the Pall Mall account.

Q Were you paying any attention to the television codes then?

A Insofar as they affected us. I don't remember any particular reason for paying any attention at that time.

Q Weren't you aware that almost immediately following the Surgeon General's report in January 1964 the NAB Codes did establish new standards for cigarette advertising?

A I was aware of it, yes.

Q Were you aware of the statement that is quoted there --

A Quoted where?

Q Of the code director that the code changes were only a significant first step and that the cigarette question is under continuing review?

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1 A I don't remember that.

2 Q Have you been aware since then that cigarette
3 advertising has been under continuous examination, discussion,
4 and review by the NAB Codes, by government agencies, by
5 Congress, by broadcasters, and by many others?

6 A We have been aware of this.

7 Q Isn't it the fact that since then there has been
8 a continuing discussion, even argument, and a continuing
9 disclosure of new data concerning the relationship of
10 cigarette smoking and health?

11 MR. KRASH: Objection. You don't know anything
12 about that area, do you, smoking and health?

13 MR. LOEVINGER: Just a minute. I object to you
14 instructing the witness what he knows. I have never
15 heard a more blatant instruction to a witness in my life.

16 MR. KRASH: You are hearing it now.

17 MR. LOEVINGER: I am outraged. I think it is
18 wholly improper. When I want to examine you, Mr. Krash, I
19 will call you as a witness.

20 MR. KRASH: Just a minute. You quiet down while I
21 am speaking. Give me the courtesy of letting me speak. I have
22 an objection --

23 MR. LOEVINGER: I didn't object. You told the
24 witness what he knew.

25 MR. KRASH: Just a minute. I object to any line

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of questions of this witness respecting the smoking and health issue for which the witness has not be qualified as an expert.

MR. LOEVINGER: Did you follow that rule in the examination of our witnesses.

MR. KRASH: I made my point. If you want to proceed, go ahead. The witness is not qualified as an expert on smoking and health.

MR. LOEVINGER: I didn't contend he was. Read the question to the witnesss, please.

(Question read.)

MR. KRASH: I object to the form of the question. Would you rephrase it? I don't understand it. Do you understand it?

THE WITNESS: Would you rephrase it? I am sorry, I have been lost in this interchange.

BY MR. LOEVINGER:

Q All right. You have been concerned since February of 1964 continuously with the advertising of cigarettes, have you not?

A Yes.

Q This has been your full-time professional occupation, hasn't it?

A That is right.

Q And I assume that like any -- strike that. I

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1 assume that you have made it your business to try to keep
2 informed about matters that relate to your full-time professional
3 occupation, have you done so?

4 A Yes.

5 Q During that period in periodicals, in some of the
6 periodicals you have mentioned and in others there has been a
7 continuous flow of reports about contentions, arguments,
8 allegedly scientific disclosures, reports of government
9 agencies, in fact a very great number of new reports concerning
10 the relationship between cigarette smoking and health, has
11 there not been?

12 MR. KRASH: I object to the form of the question.
13 You have asked so many things there I don't see how any
14 witness can answer that. I assure you that question is not
15 susceptible of being given a fair answer.

16 (Question read.)

17 MR. KRASH: Do you have a specific report in mind you
18 want to ask him about? I wouldn't object to that.

19 MR. LOEVINGER: We will get to that.

20 THE WITNESS: I must ask too, there are so many
21 things there, I am sure that some, in the normal course of
22 reading, any literate person, I hope I am one, reads them.
23 But I don't know which specific category.

24 BY MR. LOEVINGER:

25 Q There have been many news reports --

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1 A I read the newspapers, yes.

2 Q There have been many, many news reports about the
3 relationship between cigarette smoking and health, haven't
4 there?

5 A Yes.

6 Q There has been a continuing debate in Congress
7 about this, has there not been?

8 MR. KRASH: What do you mean by continuing debate?
9 You mean all of the time?

10 MR. LOEVINGER: Off and on since the Surgeon
11 General's report this subject has been discussed in Congress,
12 hasn't it?

13 THE WITNESS: Yes.

14 BY MR. LOEVINGER:

15 Q And you are aware the the FCC, the Federal Com-
16 munications Commission, has considered it, hasn't it?

17 MR. KRASH: Smoking and health? Is your question
18 that the FCC considered smoking and health?

19 MR. LOEVINGER: If the witness doesn't understand,
20 I expect him to tell me so.

21 MR. KRASH: I object to the form of the question as
22 misleading the witness.

23 BY MR. LOEVINGER:

24 Q The FCC has concerned itself and issued reports
25 and orders relating to cigarette advertising, founded on the

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FCC's alleged data relating to cigarette smoking and health.

MR. KRASH: On whose data?

MR. LOEVINGER: On data which the FCC referred to.

THE WITNESS: I am not aware of FCC issuances on this subject.

BY MR. LOEVINGER:

Q Are you telling us you are not aware the FCC has ever issued a decision or order relating to cigarette advertising specifically?

A I don't know of any on cigarette advertising.

Q On broadcasting?

A No, I am not aware of that.

Q As far as you are aware, the FCC has never issued a specific order or notice relating to cigarette advertising on television or radio. Is that correct?

A I am not aware of it. It is something you mean that I don't understand.

Q Are you aware that during the period since the Surgeon General's report that there has been some continuing problem concerning the form and contents of cigarette advertising?

MR. KRASH: I object to that as really so vague. Who are you referring to? What are you trying to ascertain from the witness?

MR. LOEVINGER: Would you like to have me examine

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you first, Mr. Krash and then get to the witness?

MR. KRASH: No, I think the questions really are so vague that they are not susceptible of being answered. I object to the form of those kinds of questions.

MR. LOEVINGER: You have your objection.

Can you answer the question?

THE WITNESS: You have to read it back to me.

(Question read.)

MR. KRASH: What problem are you talking about?

THE WITNESS: I can't answer that.

BY MR. LOEVINGER:

Q Haven't your advertising agencies come to you with the cigarette advertising, and your cigarette advertising programs, from time to time, since the Surgeon General's report and told you there were standards they had to meet relating to the content of those ads?

A We have had discussions on the contents of ads, yes, on cigarettes.

Q In the course of those discussions has any reference been made to the existence of any standards or guidelines of any kind?

A Standards of whose?

Q Of any kind. What have they said to you?

MR. KRASH: During all of the years since 1964, what are all of the things said to him by the agencies about

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standards?

BY MR. LOEVINGER:

Q Have any of your advertising agencies at any time, since 1964, said anything to you about cigarette advertising guidelines or standards?

A Yes.

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Q Now, what is the first such reference that you remember as nearly as you can place it.

A Just am not prepared to remember that.

Q Can you remember any communication with any of your advertising agencies concerning cigarette advertising and applicable standards and/or guidelines relating thereto?

A Can I think of any? Yes.

Q All right. What can you remember about this?

A Well, it is hard to remember the various brands and problems there have been. There have been, broadly, when anything in the opinion of the people who handle standards and practices had anything that seemed remotely connected with health it was changed. I can't think of any specific instances. The brands basically have to relate to taste and claims in that area. This is when in their judgment anything seems to tend in that area -- I can't remember what they were. In any case, whatever they were was resolved or the advertising wouldn't be on. But this would have been with the agency standard practice people at the networks.

Q You wouldn't get involved in it?

A Not unless there were a question in the discussions, in whatever change was made, yes, because it would be made only with my approval.

Q You mean change in the contents of the ad?

A Changes in copy, yes.

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1 Q All changes in copy of the ad have to be cleared
2 with you?

3 A Yes.

4 Q Well, this did require them to tell you the reasons
5 for the changes, then, didn't it?

6 A Sure.

7 Q And from time to time there were changes related to
8 applicable guidelines and standards, were there not?

9 A Yes.

10 Q Didn't you understand that all health claims had
11 been effectively forbidden in cigarette advertising?

12 MR. KRASH: By whom?

13 THE WITNESS: There are no health claims -- I can
14 speak only for my own company -- in any of our advertising.

15 BY MR. LOEVINGER:

16 Q Didn't you advertising agencies tell you in sub-
17 stance that you weren't permitted to make such claims in
18 cigarette advertising?

19 A This is know, yes.

20 Q And haven't you also been told in substance that
21 when you refer to either tar or nicotine, certain specific
22 disclosures have to be made?

23 A Yes, about the amount of tar and nicotine. This is
24 a relatively recent decision.

25 Q How recent? Do you have any idea?

1 A Oh, within the last few months. I don't know the
2 exact date.

3 Q Do you remember who first told you that?

4 A It was not told to me; it was told to our product
5 manager and I am sorry, I don't have the first date it was
6 done. Let me see if it shows here.

7 It must have been early in '69, Mr. Loevinger.

8 Q Do you know who told you?

9 MR. KRASH: What is the question? Told him what.

10 THE WITNESS: The disclosure of tar and nicotine. I
11 don't remember who told me.

12 BY MR. LOEVINGER:

13 Q Let me go back a minute. After the NAB adopted
14 standards, or after the Surgeon General's report came out, a
15 group of tobacco companies got together to formulate a
16 cigarette advertising code, did they not?

17 A That is correct.

18 Q This was about April, 1964.

19 A Right.

20 Q American Tobacco Company was one of those that
21 participated, was it not?

22 A Yes.

23 Q And you sought antitrust clearance from the Department
24 of Justice for that code, did you not?

25 A I am not aware of that. I was not at American

1 Tobacco Company on that date, Mr. Loevinger.

2 MR. LOEVINGER: Would you mark this as NAB Exhibit
3 36, please.

4 (The document reffered to was marked
5 NAB Exhibit No. 36, for identifi-
6 cation.)

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7 BY MR. LOEVINGER:

8 Q Showing you a document marked NAB Exhibit 36, I
9 ask if you have ever seen that document or a copy thereof
10 before?

11 A No, sir, I have not.

12 Q Have you ever been advised there was such a document
13 in existence?

14 A No, sir.

15 Q You don't know anything about it.

16 A I heard it raised at the hearing on Friday. That
17 was the first time I had heard of it. I have never seen it.

18 Q What was your relationship to the Tobacco Advertising
19 Code?

20 MR. KRASH: By "your," do you mean his personally
21 or American Brands?

22 BY MR. LOEVINGER:

23 Q What was yours personally and that of your company?

24 A I was the representative who went down from the
25 American Tobacco Company to the Code to present our advertising

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1 to Governor Miner.

2 Q What is the correct name for that organization?

3 A Cigarette Advertising Code.

4 Q You were the American Tobacco Company representative
5 to the Cigarette Advertising Code?

6 A On the advertising aspects only.

7 Q Now, were you aware of the provisions of that code
8 at that time?

9 A Yes, I was.

10 Q Do you remember any of them?

11 A No. I remember the main thrust, but I don't remember
12 the code itself. It has been sometime.

13 Q Tell us what you recall of it, please.

14 MR. KRASH: Mr. Loevinger, I haven't objected up to
15 now to these questions about the cigarette advertising code
16 but I think it is an utterly irrelevant excursion. I wonder
17 if you could indicate what you think the relevance of this
18 is.

19 MR. LOEVINGER: I expect to indicate to the court,
20 Mr. Krash.

21 MR. KRASH: I will let the witness answer this, but
22 at some point I will call a halt.

23 MR. LOEVINGER: This is a discovery deposition, and
24 we are entitled to inquire not only as to all matters that are
25 admissible or might be admissible, but as to all matters that

1 might lead to the discovery of admissible evidence.

2 MR. KRASH: I understood you are taking this for the
3 purposes of preliminary injunction hearing, is that right?

4 MR. LOEVINGER: I was told this morning you didn't
5 regard yourself as so limited and I don't think we are any
6 more limited.

7 MR. HAWKE: You agree that limitation is of the
8 depositions.

9 MR. DYK: We do not agree. We believe the depositions
10 are limited, though I am not saying that Mr. Loevinger is
11 limited in this respect.

12 MR. DODELL: Without commenting on the applicability
13 of the limitations to this specific line of questioning that
14 is being pursued now, the Federal Trade Commission does
15 consider the depositions limited in accordance with the letter
16 that Mr. Wollenberg sent to J. McGuire.

17 MR. LOEVINGER: Would you read the question?

18 (The Reporter read the pending question.)

19 BY MR. LOEVINGER:

20 Q Referring to the Cigarette Advertising Code.

21 A It has been some time, but it was, I think, there
22 were provisions against appealing to youth, or showing that
23 cigarette smoking was sophisticated, I don't remember the
24 exact words. We had certain restrictions on models on tele-
25 vision. They had to not only look 25, but be 25. It is

1 very difficult for me to recall these.

2 Q I understand. There were sanctions for violation of
3 the Code, were there not?

4 A Yes, there were.

5 Q In fact the Code could impose what was called
6 liquidated damages not to exceed \$100,000 for the violation;
7 is that correct?

8 A Yes.

9 Q And how long was the American Tobacco Company a
10 member of that Code?

11 A I think for approximately two years. Do we have
12 the exact date? August 9, '67, was the date we withdrew. So
13 whatever the date was that it started we were in at the
14 beginning.

15 MR. DODELL: Excuse me, Mr. Cohen, could you keep
16 your voice up.

17 THE WITNESS: I will try. I am sorry; it is getting
18 a little worn.

19 MR. ADLER: Too much tobacco smoke.

20 BY MR. LOEVINGER:

21 Q American Tobacco Company withdrew from the Cigarette
22 Advertising Code on or about Aug. 9, 1967?

23 A That is correct.

24 Q As the Code representative, were you involved in
discussions within the company preceding your withdrawal?

1 A No, I was not. That was a decision of the then
2 president.

3 Q Who was then president?

4 A Mr. Walker.

5 Q Did he just -- did he advise you that the company
6 was withdrawing?

7 A He did. He wrote a letter to the Code resigning.

8 MR. KRASH: Excuse me, Mr. Loevinger. I think
9 probably there was an error inadvertently a minute ago. I
10 think you referred to the witness as the Code representative.
11 I did not understand that to be his testimony. I could be
12 mistaken about that.

13 THE WITNESS: On advertising matters. I was not
14 the -- the legal matters, of course, it was the legal depart-
15 ment. But I went down there with the advertising to present
16 it.

#11

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#12 htl

BY MR. LOEVINGER:

Q How were you advised of the American Tobacco Company's withdrawal from the cigarette advertising code?

A The management decided to withdraw and so advised me.

Q How did they advise you?

A In person, as I recall.

Q Who advised you?

A Probably Mr. Heiman.

Q I thought you just said Mr. Walker was president?

A Well, he was president, and Mr. Heiman was executive vice president at that time.

Q Do you recollect --

A He was still my superior.

Q Do you recollect being advised of the withdrawal?

A Oh, yes.

Q What did Mr. Heiman say to you?

A I don't remember.

Q Didn't he give any reason?

A Well, the reason was contained in Mr. Walker's letter which was sent to Governor Miner at the time.

Q Did you see the letter?

A Yes.

Q Did Mr. Heiman talk to you about the letter when it was sent?

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2he 1 A No. It was just composed and I received a copy
2 of it.

3 Q Did Mr. Heiman talk to you about it or didn't he?
4 I haven't got that clear yet.

5 A No, he did not.

6 Q Mr. Heiman did not talk to you about it?

7 A No, except to say here is what we are doing and the
8 reason.

9 Q He just handed you a copy of the letter?

10 A No, we discussed the letter and what it meant.

11 Q What was your discussion with Mr. Heiman on that
12 occasion?

13 A Well, simply a reiteration of the facts contained
14 in Mr. Walker's letter which said that there was a duplication
15 in the cigarette advertising code and the NAB Code, and it
16 was a cumbersome procedure, which it was, and the same basic
17 rules were in both and that is why he withdrew.

18 Q Actually the cigarette advertising code also
19 covered the print media, didn't it?

20 A Yes.

21 Q And the NAB Code does not cover the print media,
22 does it?

23 A It does not.

24 Q Did you have any discussion with him about that
25 discussion?

3ht

A No.

Q Did you have some meetings with officials of the NAB Code several times during the latter part of 1967 and after your discussion with Mr. Heiman?

A Did I personally, Mr. Loevinger?

Q Yes.

A I don't recall them. I may have.

Q Actually as early as April 1967 you had some correspondence with the NAB Code people, didn't you?

A May I see that? I don't know.

Q I am showing you NAB Exhibit 9.

A I am sorry to take so long. It has been April '67. I remember this letter.

Q This is a copy of a letter that you received?

A Yes, from Stockton Helffrich.

It refers to -- the chief thrust of that is the sport section, and there was I recall now at the time some question about people in television commercials engaging in heavy athletics and they had gotten to the point where they were even considering golf too strenuous and this was part of that.

Q Now is this letter a substantially accurate resume or summary of the matters that it recites?

A This is the letter that I received from Stockton, yes.

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Q Well, you have just read it. So far as you can now recollect, does it accurately set forth the things that it refers to?

A Yes, as far as I know, it is fairly a quick reading, but I would say it did.

Q On page 2 of it it says "Tar and nicotine statements: Code authority staff interpretations previously explored with you continued unchanged." Does this refresh your recollection that you had in fact prior to that time discussed the question of tar and nicotine disclosures in cigarette advertising with the Code?

A I don't recall that specifically, that we had. This may have been a general tar and nicotine, if you do it. I don't recall any actual questions that we had. This may have been just a general guidance thing.

Q You don't recall whether or not you had any such discussion?

A I don't recall any specific discussion, no.

(Recess.)

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BY MR. LOEVINGER:

Q In October of 1967, Mr. Cohen, you were in your present position, were you not?

A In October '67, yes.

Q Who was Mr. W. J. Moore at that time?

MR. KRASH: You mean what position did he occupy?

BY MR. LOEVINGER:

Q Was he your assistant?

A I forget the exact dates, Mr. Moore is here, but he was my assistant. I think he was at that time.

Q Showing you NAB Exhibit 10, which is apparently a memorandum to him, I ask you if you have seen that before.

A I obviously have seen it, my name is on it.

Do you mind if I read it?

Q No, please do.

A All right, sir.

Q Have you seen that before?

A Yes.

Q Did you see that at about the time it came in?

A Yes.

Q I believe that transmitted a letter to your advertising agents for Silva Thins from the Code Authority, which did refer to tar and nicotine statements in cigarette advertising as contained therein, did it not?

A Yes.

Q Now showing you a document marked NAB Exhibit 4, which appears to be a letter to you dated March 14, 1968, I ask you if you recognize having seen that before.

A Yes, sir.

Q Sir?

A Yes, I remember it.

Q You remember that?

A Yes.

Q Does that refresh your recollection as to the events referred to therein?

A Yes.

Q Did they occur substantially as related?

A Yes, but I think I should explain that the submitting of commercials to the networks and to the Code directly proved to be very cumbersome and the policy about this time or our policy was to submit them to the networks because it was my feeling, and this was my decision, that the NAB is the trade association of the broadcasters, and should deal with them just as I dealt with the cigarette Code, since it was our association when we were in it. So that is the reason for the procedure.

Q That does refer to the fact, does it not, that on November 10, 1967, that you had a meeting with Code authorities and did agree to submit to the Code authorities all commercials which --

1 A Which are affected, yes.

2 Q Which you know or had reason to believe were af-
3 fected by the provisions of the cigarette advertising guide-
4 lines or the Code. Is that correct?

5 A That is correct.

6 Q Are you telling us that subsequently you decided to
7 that change, that procedure?

8 A And to leave that function where it rightly belonged,
9 with the networks. Now they might prefer us, as they did on
10 one occasion, to say discuss it, and we did that -- not we
11 but our agency.

12 Q Did you ever advise the Code that you were changing
13 that procedure?

14 A Yes.

15 Q When?

16 A At the time it was done. I don't remember the
17 exact date, Mr. Loevinger. But I told them this is the way
18 we would function.

19 Q Who did you tell?

20 A I believe Stockton Helffrich.

21 Q When?

22 A I don't remember the date.

23 Q What did you say to him?

24 A I said this is basically what I have said to you,
that it is our opinion that the networks are responsible for

clearing material which we send them and if they have any questions, this was not my affair, but I assumed they would discuss it with the Code.

Q Since that time you have not submitted any advertisements to the Code for clearance. Is that correct?

A Well, I think I should -- I think the word clearance -- it is fair to say that when there was a question on the Pall Mall ad which one of the networks requested that we discuss with the Code, the president of one of our advertising agencies and his product manager or management supervisor, rather, at the agency went over and worked out the problem with Helffrich and it was then in turn satisfactory to the three networks.

Q But the American Tobacco Company or American Brands has never undertaken to submit an advertisement directly to the Code authorities.

A Not that I remember.

Q Now HAD Exhibit 10 contains a transmission to your agency of a communication regarding the Silva Thins ads, does it not?

A Is this the one I have here?

Q Yes. The number is marked in the upper righthand corner. Oh yes. Yes.

Q And it says, does it not, in substance, that the tar and nicotine statements in the Silva Thin ads are

unacceptable under the Code?

A Well, I don't know how this was worked out. Obviously it was, because that is the copy that is here.

Q That is what you were advised in October 1967.

A That is in this letter, yes.

Q That was approximately the time you introduced Silva Thins, is that right?

A That is correct.

Q Then in April 1968 didn't you get a copy of a letter that I show you that is marked NAB Exhibit 11?

A Yes, sir.

Q Is that correct?

A Yes.

Q You remember that.

A Yes.

Q And then did you finally get a letter, a copy of which is marked Plaintiff's Exhibit 58, which is from Braren to Norman Craig & Kummel, dated April 18, 1968?

A Yes, sir.

Q Do these three documents that you have concerning which you have just testified refer to the same Silva Thins advertising that has continued to be broadcast since then?

A To the same basic advertising, yes, sir.

Q Is that --

A The words are the same. The pictures may be a little

different, but the words used then and now are about the same.

Q Is that the advertising that is in issue in this lawsuit, the Silva Thins advertising?

A Is this in issue in our complaint?

Q Yes, is this the advertising that we are talking about here?

MR. KRASH: You mean is this the currently run advertising?

THE WITNESS: Yes.

BY MR. LOEVINGER:

Q Is this the advertising that is the subject of the litigation we are now engaged in taking depositions on?

A I take it it is, yes, sir.

Q So far as the record shows then this advertising is essentially the first advertising that you offered for Silva Thins when they were introduced, right?

A Correct.

Q It was rejected by the Code on October 17, 1968, as unacceptable, misleading --

MR. KRASH: When? That is October 17, 1967.

MR. LOEVINGER: '67, I'm sorry. I stand corrected. And again on April 4, 1968.

MR. KRASH: Was your question complete?

BY MR. LOEVINGER:

Q Is that right?

1 A Yes.

2 Q Then on April 18, 1968 the Code Authority said it
3 would not pursue the objections, but that this decision is
4 subject to re-evaluation.

5 Isn't that right?

6 A That is what it says, yes.

7 Q And you have never had any subsequent communication,
8 approval, or other indication of Code Authority views with
9 respect to that up to the time of this lawsuit. Isn't that
10 right?

11 A I think that is correct, yes.

12 Q Now this advertising that is referred to in this
13 correspondence, is this the only kind of advertising you have
14 done on behalf of Silva Thins?

15 A Yes, sir.

16 Q Haven't you had spot ads for Silva Thins?

17 A They would be the same except instead of running
18 them on the network, you run them on the local stations. It
19 would be the same material, Mr. Loevinger.

cmc 1

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Q Since this record is being made for someone who is not necessarily familiar with the broadcasting industry, will you please explain for the record what spot ads are and network ads?

A The difference is simply that the network, chiefly the major networks, NBC, CBS, and ABC, we broadcast on 150 to 180 stations and spot broadcasts is where you buy the market by market and it is put in at different times throughout the country.

Q In what markets are you using Silva Thin spots?

A I don't know. We buy them off and on in flights, so that I don't know if any are currently running, Mr. Loevinger. I don't have the schedule with me. There have been, it has never been a major part of the operation, the network broadcast part of it.

Q Now Mr. Cohen, one of our associates said he saw a Silva Thin ad the other evening that did not have any reference to tar or nicotine.

Is there any such ad running?

A None to my knowledge.

Q You are not aware of any such advertising?

A I am totally unaware of it. It is the only story we have and I don't know of any commercial like that.

Q Are there any Pall Mall ads being broadcast without reference to tar and nicotine?

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cmc 2

A No, sir.

Q None at all?

A None at all.

Q When did you start the current line of ads with Pall Malls that refer to tar and nicotine?

A The current ad that is on started at the end of 1968. It has been running all through '69.

Q Did the ad prior to 1968 refer to tar and nicotine?

A Let me refresh my memory.

Would you excuse me a second, Mr. Moore has the list.

Q Surely. Feel free to consult any references or people.

A The first date of the tar was October 18, 1968.

Q October 18, 1968.

Prior to that time you were advertising Pall Malls without reference to tar and nicotine. Is that correct?

A That is correct, sir.

Q Have you observed any differences in the volume of sales since October 18, 1968, in the sale of Pall Malls?

A Yes, sir.

Q What has that been?

A Beginning in December I think it was of 1968 and continuing until the present time the sales of Pall Mall which were declining in the previous year have been increasing at the

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rate of approximately ten per cent a month and this has continued throughout 1969.

Q Is that Pall Mall Golds?

A Pall Mall Golds.

Q What about Pall Mall Reds?

A Pall Mall Red has been decreasing at almost a normal eight or nine per cent rate that just keeps continuing that way.

Q Are you using any spot ads for Pall Malls?

A We use some on the same basis that we did on Silva Thins, occasional flights in certain markets.

Q Do you know what the copy for those spot ads is?

A They would be identical to the network.

Q You have no other types of ads running for Pall Malls now?

A No, sir.

Q Do you advertise other brands of cigarettes?

A Yes, we do.

Q What other brands?

A Tarryton, Carlton, Lucky Filters, and of course Pall Mall and Silva Thin -- you mentioned Pall Mall and Silva Thin of course.

Q Yes.

A I think those are the main ones.

Q Are you using tar and nicotine references in the

cmc4 1 advertising of any of those brands?

2 A Yes, in Carlton. This is not in broadcast at all,
3 it is in print only.

4 Q How about Tarryton?

5 A Tarryton does not have any tar claim.

6 Q Is that being broadcast? Are you advertising
7 on broadcasting?

8 A Yes. That is in broadcasting, on the same basis
9 as Silva Thin and Pall Mall.

10 Q How about Lucky Filters?

11 A Not on the air.

12 Q How long have you been advertising Tarryton on the
13 air?

14 A You are speaking now of television only?

15 It started of course in the radio days. I would say
16 in radio in the early forties and in television certainly
17 for the last ten years.

18 Q Are the sales of Tarryton increasing or decreasing?

19 A At the current time they are static.

20 Q Has Carlton ever been advertised on the air?

21 A Yes, it has been.

22 Q When?

23 A Approximately three years ago it was n on spot
24 openings. It has not been on network. This is just in a
25 few markets.

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Q Only casual broadcasting advertising?

A Yes.

Q How long has Carlton been on the market?

A I just don't know. It would be approximately '63, somewhere in there.

Q Are its sales increasing or decreasing?

A They are presently increasing.

Q Have Lucky filters ever been advertised on the air?

A Yes.

Q When?

A ~~Yes~~, about four years ago.

Q Were they advertised for any substantial period of time or only casually?

A Casually.

Q So that they have been advertised almost entirely in print?

A They are currently only in print, yes, small newspaper space.

Q Are their sales increasing or decreasing?

A Decreasing.

Q What type of cigarettes are Tarryton?

A Tarryton is a filter cigarette with an activated charcoal filter and there are two versions of it, one is 85 millimeters and one is a hundred.

Q What type is Carlton?

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6 1 A Carlton is a filter cigarette that is low in tar.

2 Q What length?

3 A Eighty-five millimeters.

4 Q Is that what is known as king size?

5 A Yes, sir.

6 Q What type is Lucky filters?

7 A Lucky filter is an 85 millimeter, regular filter.

8 Q The 85 millimeter is generally referred to as
9 king size, isn't it?

10 A Yes.

11 Q Now there are other cigarettes on the market that
12 are being widely advertised besides those of your company, are
13 there not?

14 A There are, sir.

15 Q And many of them are being tested without tar and
16 nicotine claims, are they not?

17 A That is correct.

18 Q What is the largest selling brand of cigarettes
19 today?

20 A Winston.

21 Q Isn't that being advertised without tar and
22 nicotine claims?

23 A It is.

24 Q What is the next largest selling brand?

25 A Ball Mail non-filter red. That is No. 2.

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7 1 Q They are the ones that are not being advertised at
2 all. Is that correct?

3 A Yes, sir.

4 Q What is the next largest selling brand?

5 A I believe currently it is Marlboro.

6 Q Aren't they being advertised without tar and
7 nicotine claims?

8 A Yes, sir.

9 Q I take it that you have consulted with others within
10 your company concerning your plans for advertising during 1970,
11 have you not?

12 A Yes, we have.

13 Q And have you considered the possibility that you
14 would be required to comply with the so-called new guidelines
15 that are set to be effective January 1?

16 A It has been discussed certainly.

17 Q And if those guidelines become effective, you would
18 then have two alternatives, would you not, either to advertise
19 Silva Chins and Pall Malls without any tar and nicotine
20 claims, or to use the tar and nicotine claims and give all of
21 the data required by the guidelines?

22 A That is correct.

23 Q Have you made any decision as to which course you
24 would follow?

25 A No. We have not.

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Q Have you prepared alternative ads that you could use with respect to either of those courses?

A No, sir.

Q You have made no attempt to prepare any advertising at all?

A No, sir.

Q Why not?

A Well, I --

MR. KRASH: Is that a question as to why he has not made alternative plans?

BY MR. LOEVINGER:

Q Yes. Why haven't you made any plans as to what kinds of advertising you will do after January 1?

A We simply have not.

Q How long will it take you to prepare new ads?

A Well, normally the creative work takes about two weeks and the actual making of the film can take anywhere from six to eight weeks with new material.

Q Up to the present time you have made no beginning toward preparing any new kinds of advertising at all.

Is that correct?

A That is correct.

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Q Now the complaint in paragraph 22 says that the FTC policy statement of October 9, 1969 is identical, it uses that word, with the relief asked in the FTC complaint issued against your company, and the complaint in paragraph 23 says that the FTC statement of October 9, 1969, is phrased in precisely the same terms as the complaint issued against your company. Is that correct?

A Yes, sir.

Q The complaint in paragraph 25 alleges that the amendment to the NAB guidelines which is intended to implement and put into effect the FTC policy statement of October 9, 1969, isn't that correct?

A Yes, sir.

Q Have you seen the FTC complain issued September 29, 1969, against your company?

A Yes, sir.

Q When did you see it, by the way?

A Is this it?

MR. KRASH: Are you talking about the proposed complaint or the complaint as issued?

MR. LOEVINGERS: As issued, September 29.

THE WITNESS: This is the first I have seen it in actual form. I have known the contents of it, Mr. Loevinger.

BY MR. LOEVINGER:

Q You have known the contents?

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1 A Yes, sir.

2 Q Now the FTC complaint makes certain very
3 specific demands of your company as to the kinds of statements
4 it may make with respect to tar and nicotine in cigarette
5 advertising, doesn't it?

6 MR. KRASH: The complaint or the proposed order?

7 BY MR. LOEVINGER:

8 Q The proposed order, which is the relief demanded
9 in the complaint?

10 A Which one is that?

11 MR. KRASH: (Indicating to witness.)

12 THE WITNESS: Right. Yes, sir.

13 BY MR. LOEVINGER:

14 Q This would direct affect the kind of advertising
15 that you do for at least two of the brands that you are in
16 charge of advertising for your company, wouldn't it?

17 MR. KRASH: Excuse me a minute. You mean if this
18 order were entered finally against American?

19 MR. LOEVINGER: Yes.

20 MR. KRASH: Not the existence of the complaint,
21 but the entry of the order?

22 MR. LOEVINGER: Yes.

23 THE WITNESS: Yes, it would.

24 BY MR. LOEVINGER:

Q And the thrust of the complaint is that the new

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guidelines of the NAB --

MR. KRASH: The thrust of which complaint?

BY MR. LOEVINGER:

Q The thrust of the American Brands complaint in this lawsuit is that the new guidelines of the NAB in effect adopt the relief asked in the FTC proceeding. Isn't that correct?

MR. KRASH: Don't answer that. That is a legal conclusion of counsel and you should not answer that. That is not an accurate statement of the thrust of the complaint.

MR. LOEVINGER: Isn't that what the complaint alleges, Mr. Krash?

MR. KRASH: That is not an accurate characterization of the complaint, Mr. Loevinger.

MR. LOEVINGER: Isn't that what it alleges?

MR. KRASH: If you want to refer to a specific paragraph, I could comment on it. But that is not an accurate characterization of it.

MR. LOEVINGER: Isn't that what paragraph 22, 23 and 25 specifically allege?

MR. KRASH: Let's look at them and see.

My difficulty is I don't think the question put to the witness is a fair characterization of the complaint. It refers really I think to a part of it.

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BY MR. LOEVINGER:

Q Let me ask you this, Mr. Cohen: Have you been told that -- have you discussed the effect of the NAB guidelines on your advertising with anyone?

A Oh, yes, the effect of them, that has been one of our great problems that we face and we have certainly discussed it in the company and with our agencies. I take it that is why we are here.

Q Isn't it your understanding that the effect of the NAB guidelines is to require you, as of January 1, 1970, to do what the FTC is seeking to require you to do at some later date?

A Well, again, may I consult counsel on this, because it has a -- it looks to me to be the same basic request.

Q Yes. That is your understanding of it.

A Yes.

Q Now what the FTC requires is stated in 4, or what the FTC seeks to require is stated in four specific paragraphs, isn't it?

A Right.

MR. KRASH: Seeks to require in what, the complaint?

MR. LOEVINGER: In the complaint.

BY MR. LOEVINGER:

Q First if you advertise tar, the tar content in milligrams should be stated. Is that correct?

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A Correct.

Q The second one is that if you compare your tar content to another brand, the tar content in milligrams of the brand to which you make comparison shall be stated. Is that the second requirement?

A That is correct.

Q The third is that the brand name of the cigarette to which your brand is compared shall be stated. Is that correct?

A That is correct.

Q And the fourth requirement is that the tar content in milligrams of the lowest and the highest yield domestic cigarettes shall be stated in the event that tar statements are made?

A Right.

Q Now those are quite comprehensible requirements, aren't they?

A Yes.

Q You have never asked the NAB Code for any clarification of these requirements, have you?

MR. KRASH: Just a minute. Are you asking him whether he asked the NAB Code or clarification of the requirements in the FTC complaint? Is that the question?

MR. LOEWINGER: I think he understood my question.

MR. KRASH: Do you understand the question?

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6ht 1 THE WITNESS: Well, I don't understand if you are
2 referring to the NAB Code or the FTC. We have not had any
3 discussions on the FTC complaint with the NAB, if that is the
4 question.

5 BY MR. LOEVINGER:

6 Q Have you as American Brands ever asked the NAB
7 for any specific clarification of the requirements for
8 cigarette advertising after November 1 with respect to tar
9 and nicotine claims, to your knowledge?

10 A Not to my knowledge.

11 Q Now there has been some talk as to whether or not
12 you can give all of the data required by these four require-
13 ments in a 30 second commercial?

14 A Yes.

15 Q Have you ever made an attempt to state a commercial
16 that would give these requirements in 30 seconds or less?

17 A I have written one since I have been here which if
18 I may I would like to read to you.

19 Q All right.

20 A It is in longhand, if you will bear with me. "U.S.
21 Government report shows highest tar yield to be 36 milligrams
22 and the lowest to be four milligrams. The report also shows
23 the highest nicotine content to be 2.5 and the lowest to be
24 .1. Pall Mall Gold contains 19 milligrams of tar and 1.3
25 milligrams of nicotine. Winston delivers 21 milligrams of

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tar, and 1.4 milligrams of nicotine."

Q Is that it?

A That is it.

Q According to my timing that took 25 seconds.

A That would just leave us time to say "Buy Pall Mall."

Q Actually that has a lot of extra words in it, doesn't it?

A Do you want to edit it? But if you are doing it in audio, you can't say report shows, it has to be some identification of the report and you can't have it without verbs. And these are a minimum of verbs. And you can't say "contains 19," it has to be milligrams, which is a big word to say. So I don't think it is any really basically longer than -- you might cut out two or three words and I don't know which ones.

Q Can you use a stopwatch?

A Sure.

Q Now let me try you on this. I have paraphrased ABC Exhibit 6 which is the story board of one of your actual or at least one of your submitted ads for Pall Malls and I have tried to put in the information that seems to me to be required by these four provisions and let me read it to you and ask you to time me on it.

"Pall Mall Gold 100s with 10 milligrams are lower

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in tar than the two best selling filter kings, Winston and Marlboro, with 21 milligrams each, while all the domestic cigarettes range from 4 to 32 milligrams."

How long was that?

A That is 15 seconds.

Q Well, at least there is some possibility of doing a little creative work here, isn't there?

A Did you have the nicotine?

Q No nicotine. I didn't understand the FTC complaint demands referred to nicotine as they are attached to your complaint anyway.

A But in the guidelines -- well, we won't go on with this.

Q Anyway, you haven't done any real creative work trying to meet these prior to this suit, have you?

A No, sir.

MR. KRASH: Was the demonstration designed to prove our case or your case?

BY MR. LOEVINGER:

Q Now your gross sale of cigarettes in 1968 was over a billion dollars, wasn't it?

A Yes, sir.

Q In the same year Pall Malls were \$83 million in sales?

A Yes, sir.

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Q And Silva Thins were \$14 million in sales?

A I think \$17 million, sir.

Q I think your complaint alleges 14. I am sorry, I stand corrected, \$17 million. That adds up to an even \$100 million, right?

A Yes, sir.

Q So that your other brands sold a total of over \$900 million. Is that correct?

A That seems correct, yes, sir.

Q And Pall Mall Reds were the best selling of your other brands, is that right?

A Pall Mall --

Q Reds.

A Reds of the other brands, yes, sir.

Q And they sold considerably more -- well, you only had how many other brands? You only had four other brands, Pall Mall Reds, Tarryton, Carlton and Lucky Filter?

A Well, there are some smaller brands which are insignificant, Half and Half, Durham, but they are very small. But there are other brands.

Q But --

A Montclair.

Q The bulk of the \$900 million-plus is made up of those four other brands, isn't it?

A That is correct.

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Q And Pall Mall Reds are the best selling of those?

A That is correct.

Q So that they are more than one-fourth of \$900 million. Isn't that correct?

A Yes, sir.

Q Which is something well over \$200 million, right?

A I don't know the figures.

Q It has to be mathematically, doesn't it?

A Don't train me in mathematics. I would assume that is right.

Q One-fourth of \$900 million is \$225 million, is that right?

A Right.

Q And Pall Mall Reds have more than one-fourth of the remainder, right?

A Right.

Q So they outsell Pall Mall Golds and Silva Thins better than two to one?

A Right. That would make a good slogan.

Q Now in your discussion about cigarette advertising, has the company management discussed the Surgeon General's 1964 report and the Surgeon General's report on current information released by HEW in 1967?

A You mean by management?

Q Yes.

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A The Chairman and the President?

Q Have you discussed it --

A I have not discussed it with them, no, sir.

Q As far as you know, have any such discussions been held at the top management level of your company?

A Not so far as I know.

Q Have any discussions been held regarding the decision of the U. S. Court of Appeals in the so-called Banzhaf Case which upheld the FCC decision relating to cigarette advertising?

A Not to my knowledge.

Q There have been no discussions with you about that?

A No discussions, no.

Q Have you ever been informed of the opinion of the United States Court of Appeals of the District of Columbia Circuit regarding cigarette advertising?

A I don't know that by that title. If you tell me the content of it, I may have heard of it.

Q Well, this is a decision in which the United States Court of Appeals for this District said, among other things, "the danger situation cigarettes may pose to health is among others a danger to life itself. As the Commission emphasized, it is a danger inherent in the normal use of the product, not one merely associated with its abuse or dependent on intervening fortuitous events. It threatens a substantial

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body of the population, not merely a peculiar susceptible fringe group. Moreover the danger, though not established beyond all doubt, is documented by a compelling accumulation of statistical evidence."

And later in the opinion the Court also refers to cigarette smoking as a "unique danger authenticated by official and Congressional action."

MR. KRASH: What is the question?

BY MR. LOEVINGER:

Q Has this Court opinion ever been called to your attention?

A I have never heard this until now.

Q Never heard it until now?

A No, sir.

Q Have you had any discussions at all at the management level of your company concerning the health hazard of cigarette smoking?

A I have not, sir.

Q Have you, yourself, been at all concerned with that problem personally?

MR. KRASH: Don't answer that. It is irrelevant.

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1 BY MR. LOEVINGER:

2 Q Have you thought about the health hazards of ciga-
3 rette smoking, Mr. Cohen?

4 MR. KRASH: Don't answer that, Mr. Cohen. That's
5 not relevant to the issues here.

6 BY MR. LOEVINGER:

7 Q Have you thought about the moral and ethical impli-
8 cations of selling a billion dollars worth of goods that
9 constitute a unique danger to millions of American citizens,
10 Mr. Cohen?

11 MR. KRASH: Don't answer the speeches Counsel is
12 making. Just don't answer it. It is entirely improper
13 questioning; Mr. Loevinger is engaging in a harangue of the
14 witness.

15 It seems to me these are questions he might properly
16 address to his principals and not to this witness.

17 MR. LOEVINGER: Counsel is now claiming that
18 ethical, moral and public interest consideration are ir-
19 relevant to the demand for equitable relief?

20 MR. KRASH: Is there a question pending?

21 MR. LOEVINGER: Is this your position, Mr. Krash?
22 Is this the basis of your objections?

23 MR. KRASH: Is there a question pending?

24 MR. LOEVINGER: I ask you if this is the basis of
your objections to my preceding questions?

MR. KRASH: Do you want to adjourn the deposition?

MR. LOEVINGER: I'm not through.

Are you instructing your witness not to answer?

MR. KRASH: I'm instructing him not to answer. There is no question pending at the moment.

BY MR. LOEVINGER:

Q Mr. Cohen, are you personally at all concerned about the health hazard of cigarette smoking?

MR. KRASH: I instruct you not to answer the question on the grounds that it is irrelevant and improper and continues to be harassment of the witness.

Don't answer it.

MR. LOEVINGER: Irrelevancy is not a grounds of objection in a discovery deposition.

MR. KRASH: I instruct you not to answer the question.

BY MR. LOEVINGER:

Q Mr. Cohen, are you concerned that your company is selling billions of cigarettes, over a billion dollars worth a year, that cause danger to life and health of millions of American citizens that have been characterized by Government authorities as unique danger to life and health?

MR. KRASH: I instruct the witness not to answer that.

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BY MR. LOEVINGER:

Q Mr. Cohen, do you believe that there is no moral, ethical or public interest consideration involved in the sale of cigarettes or in the continued advertising and effort to get new customers for cigarettes?

MR. KRASH: I instruct the witness not to answer the question.

BY MR. LOEVINGER:

Q Mr. Cohen, your advertising is directed toward increasing the sale of cigarettes, is it not?

A Yes, it is.

Q And you are seeking to go get new customers for cigarettes, are you not?

A Yes.

Q And you think there are no health hazards involved in this?

MR. KRASH: I instruct the witness not to answer questions of that character.

MR. LOEVINGER: What is the basis of your objection?

MR. KRASH: I simply instruct the witness not to answer the question.

BY MR. LOEVINGER:

Q Do you think that there are any ethical or moral considerations involved in this course?

MR. KRASH: Don't answer.

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MR. LOEVINGER: On what grounds?

MR. KRASH: I instruct the witness not to answer.

MR. LOEVINGER: You refuse to state the grounds?

MR. KRASH: My position is clear.

Is there a question pending?

MR. LOEVINGER: Yes, there is.

MR. KRASH: The witness is instructed not to answer.

Proceed.

BY MR. LOEVINGER:

Q Do you think there is any public interest consideration involved in the course of seeking to increase the sales of your cigarettes and to gain new customers in the face of the data that we have referred to?

MR. KRASH: Let the record show that Counsel, despite repeated objections on my part on the impropriety of this line of interrogation and despite the fact that his principals, as is well known, have been in the forefront of urging an extension of cigarette advertising, for a much longer period than the manufacturers have been, is harassing the witness by improper questions which have nothing whatsoever to do with the litigation and I instruct the witness not to answer these questions.

MR. LOEVINGER: On what grounds?

MR. KRASH: I simply instruct the witness not to answer. I am not required to state anything beyond that.

BY MR. LOEVINGER:

Q Mr. Cohen, does your company believe that those customers that you are seeking to hold and the new ones you are seeking to get are entitled to make their own decision between the pleasures and the risks of smoking?

MR. KRASH: Mr. Cohen, this line of interrogation, as Mr. Loevinger is I am sure as a highly competent Counsel is well aware is entirely improper, and I instruct you not to answer.

MR. LOEVINGER: On what grounds do you object to that question?

MR. KRASH: The instruction stands.

BY MR. LOEVINGER:

Q Mr. Cohen, as a man with many years of experience in advertising, particularly in this field, don't you believe that in order to make a rational or intelligent decision between the pleasures and risks of smoking a customer or prospective customer must have knowledge of the relevant facts?

MR. KRASH: Read the question.

(The Reporter read the pending question.)

MR. KRASH: Are you asking for this witness' opinion of those facts? Is that what you are asking, whether in his opinion it is necessary?

MR. LOEVINGER: My question is in the record, it speaks for itself.

MR. KRASH: Don't answer. Your opinion is entirely inconsequential on this point.

BY MR. LOEVINGER:

Q Does your company have any position with relation to whether or not its advertising should disclose the relevant facts to its customers and prospective customers with respect to cigarette smoking?

A The relevant facts about what?

Q About the risks.

MR. KRASH: Just don't answer questions about what he regards as risks. There is no foundation that has been laid for this.

MR. LOEVINGER: Is it Counsel's position there are no risks concerned with cigarette smoking?

MR. KRASH: My position is the question is improper and I instruct the witness not to answer it.

MR. LOEVINGER: What is improper about that question?

MR. KRASH: Is there another question pending?

MR. LOEVINGER: What is improper about that question?

MR. KRASH: Is there another question pending?

MR. LOEVINGER: I demand the witness answer the last question. I think it is perfectly proper.

MR. KRASH: I instruct the witness not to answer that question.

If you think you are right, you can go to the

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courthouse and get an order of the judge.

MR. LOEVINGER: My deposition of this witness will not be completed until the questions I have asked which Counsel has improperly instructed this witness not to answer have been answered. There is nothing privileged, there is no claim of privilege, the only claim has been irrelevance and this is not an appropriate objection in a deposition and indeed Counsel pressed questions and gotten answers from our witnesses over objections that were much more substantial than that.

MR. KRASH: I suggest you proceed with the interrogation of the witness in proper order and proper form.

MR. LOEVINGER: I want you to know my deposition is not completed until my questions have been answered.

MR. KRASH: You know your rights and we know ours.

What is the question? Is there somebody else who wants to question the witness?

MR. LOEVINGER: I'm not through.

BY MR. LOEVINGER:

Q Have you had any discussions within the top management of your company concerning the disclosures that are proper or appropriate to be made in your advertising, Mr. Cohen?

A I don't understand the question; disclosures about

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Q About cigarettes.

A Well, this is so broad, does this mean disclosure about the nature of the cigarette or what?

Q Well, you are aware of the Surgeon General's report and all the discussions about that.

Have you had any discussions as to whether or not anything should be said in your advertising about any of the matters referred to in the Surgeon General's report?

MR. KRASH: Don't answer that.

MR. LOEVINGER: On what grounds is that objected to?

MR. KRASH: Don't answer it.

MR. LOEVINGER: It is absurd. This is the most ridiculous series of objections I ever heard of from a manufacturer who's seeking the extraordinary relief of a preliminary injunction on equitable grounds.

MR. KRASH: Is there a question pending?

BY MR. LOEVINGER:

Q Isn't it a fact, Mr. Cohen, that the new guidelines, -- strike that.

You understand that the purpose, one of the purposes of the present lawsuit and the thing we are taking depositions about now with respect to the preliminary injunction is to prevent the so-called new guidelines from going into effect January 1, 1970, don't you?

A Yes, sir.

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Q Isn't it a fact that what those new guidelines do is to require additional disclosures of facts regarding tar and nicotine when tar and nicotine are mentioned in cigarette advertising?

A It requires additional information, yes.

Q And you are objecting to giving that additional information, aren't you?

A That is correct.

Q Are you familiar with the fact that a bill has passed the United States Senate to prohibit all cigarette advertising on television and radio after January 1, 1971?

A That there is such a bill?

Q Yes.

A Yes.

Q And it has passed the U. S. Senate, hasn't it?

A Has it passed? I just don't know.

Q Yes. Are you familiar with the fact that Federal Communications Commission has proposed a rule that would prohibit cigarette advertising on broadcasting altogether?

A I'm not aware of that.

Q Do you have any plans for terminating cigarette advertising on television?

A We don't have any plans. If there is legislation, obviously we are subject to it.

Q Are you contemplating this as a possibility?

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A Of course.

Q With respect to that, when do you contemplate it?
When do you expect you may cease television advertising?

A Well, according to the bill, I don't know if it has
been signed --

Q No.

A There is no bill. If it goes through, obviously it
is a bill and the date contemplated I think is the end of
1970. December 30, 1970.

Q Prior to the institution of the present lawsuit, has
your company made any complaint about the legality or the
desirability of the NAB Code or guidelines regarding cigarette
advertising?

A Prior to this current --

Q Yes.

A Not that I know of.

Q Up to the present time you haven't changed your
advertising in any way in response to the proposed new guide-
lines, have you?

A No, sir.

Q Up to the present time you haven't been caused any
damage whatsoever by the new guidelines, have you?

A Not to the present time, no, sir.

MR. LOEVINGER: That is all.

I have not terminated my deposition, I have stopped

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asking questions. My deposition will be concluded when the questions I have asked, that have been improperly objected to, are answered by the witness.

MR. KRASH: What order would you like to proceed in?

MR. MONE: We have no questions.

MR. KRASH: Does CBS want to proceed?

MR. DYK: Yes.

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cmc 1

BY MR. DYK:

17

Q Mr. Cohen, we are responsible for -- this would be getting back to the time in 1967 and 1968 -- were you responsible for the decision to advertise Pall Mall Golds and Silva Thins as low tar cigarettes?

A No; that was -- any decision of that importance is a company decision at the highest level.

Q Did you participate in that decision?

A Not in making the decision.

Q Is it my understanding from your previous testimony, is my understanding correct that you make the decisions in your company as to the contents of particular ads, final decision?

A Not the final decision. The advertising of cigarettes is a vital part of the cigarette business, and the final decision is made by the, final approval, rather, of major advertising is made by the president of American Brands.

He is also president of the American Tobacco Company.

Q Are advertising agencies authorized to submit copy to the networks which has not been approved by you or someone else at American Brands?

A No.

Q Are you a member of the board of directors of American Brands?

A Yes, I am.

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cmc 2

Q There are nevertheless decisions in the area of advertising contents that you do not participate in?

A Well, basically if somebody says we are going to put out this sort of cigarette, it is done by the, chiefly by the president and then our job is to, with the help of advertising agencies, advertise it.

I certainly would get in on the discussion of new brands, what their place in the market place would be. But the order to make "X" cigarette is made at a higher level, it is a very vital decision.

Q Once the decision has been made to go forward with a particular brand of cigarette, do you participate in discussions as to the contents of the advertising of that cigarette?

A Yes.

Q Now, American Brands for a number of years has run advertising on network television, correct?

A Yes.

Q The current contract with Columbia Broadcasting System for advertising beginning in September of 1969 has not been signed, has it?

A Not to my knowledge. I am not, that is not a part of my function, but I have heard it said it has not been signed.

Q Do you know why it has not been signed?

A No; I don't.

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CMC 3

Q I wonder if you would take a look at the document marked CBS Exhibit 2 and particularly paragraph 9 thereof.

MR. KRASH: Did you direct his attention to something specific?

MR. DYK: Paragraph 9.

MR. KRASH: But I mean some specific subsection.

MR. DYK: The introductory clause and subparagraph Roman I and Roman VI. And Roman X.

THE WITNESS: Will you read those off?

It is very difficult to read.

MR. DYK: And Roman VI also.

"Agencies will cooperate with CBS in the broadcasting of commercial and billboard material and the highest possible standards of excellence. For such purpose agency will observe the following regulations in the preparation, writing and broadcast of all oral and-or visual elements of the 'agency package'. There shall be (1) no false or unwarranted claims for any product or service.

"VI. No statement or representation that may be deceptive or misleading to the public.

"VII. No deceptive or misleading visual presentation of any product or service or of its performance characteristics.

"X. No material or announcements which may in the opinion of CBS be injurious or prejudicial to the interests of

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1 the public, CBS and-or its affiliated stations or which
2 may" -- and there is an asterisk here and that adds
3 "in the opinion of CBS, be contrary to honest advertising or
4 reputable business in general."

5 MR. KRASH: Excuse me, the record does
6 show and I think you agree that this document has not been
7 executed.

8 MR. DYK: Yes, the record shows that this contract
9 for this year has not been signed. That is right.

10 BY MR. DYK:

11 Q Are you familiar with that?

12 A I understand what you said.

13 Q Is it not true that American Brands in the past has
14 signed contracts with the Columbia Broadcasting System or
15 its agencies?

16 A Yes, we have had other contracts.

17 Q Isn't it true that paragraph 9 has appeared in those
18 past contracts?

19 A Well, I know we have signed -- I have never read
20 this language. This is new to me. I am sorry, what is your
21 other question?

22 Q Isn't it true that provisions identical or similar
23 to paragraph 9 have appeared in past contracts, particularly
24 these provisions which were read into the record?

25 A I don't know as a matter of fact. I have not seen

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cmc 5 1 them. Let me explain so that you don't think -- the
2 media department in our company is a totally separate depart-
3 ment and reports directly to the president, the head of the
4 media department does not report to me. On matters of
5 contract and business matters, those are things handled
6 there and would be handled directly with the agencies.
7 So that when you ask me have we signed contracts, I am sure
8 we must have, because we have been doing business so long.

9 But as a matter of factual record, I have not seen
10 this document or signed one of these personally.

11 Q Isn't it true that in keeping with your agency
12 in the preparation of advertising to run on the Columbia
13 Broadcasting Sytem you recognize that CBS has the right
14 to exclude advertising that in its opinion is false and
15 misleading?

16 MR. KRASH: Just a minute. I think counsel has a
17 question of law which properly should not be addressed to the
18 witness. That calls for a conclusion of law which I don't
19 think the witness is competent to answer.

20 MR. DYK: I am asking a question that is relevant
21 to the witness' duties at American Brands. That is when he is
22 helping his agencies prepare advertising does he take into
23 account the fact that CBS has the right to reject advertising
24 that is false and misleading.

MR. KRASH: My difficult, Mr. Dyk, is that the

cmc 6

question presumes a right which is a legal conclusion, and which might well be disputed. That is my difficulty. I think the question is objectionable in form. You are asking the witness for a legal conclusion.

MR.DYK: Let me start again.

BY MR. DYK:

Q In your knowledge, does CBS have a policy against running false and misleading advertising?

A I just read it here in your document and I assume this is your policy.

Q And in preparing advertising for CBS, do you prepare advertising with an eye to that policy?

A No, I have not.

Q Isn't it true that approximately similar contractual provisions appear in American Brands and its agency contracts with ABC and NBC?

A I don't know.

Q Are you aware that the networks -- strike that.

Are you aware that CBS in formulating its advertising policies generally follows the policies of the Federal Trade Commission?

A I don't know what policies you are referring to.

Q Policies with respect to advertising contents?

A I don't know for a fact.

Q In the past has there been an occasion in which

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cmc 7

1 CBS has rejected an advertisement submitted by American
2 Brands or its agencies?

3 A I believe there have been rejections. I don't --
4 certainly discussions on changes. This is a constant thing.
5 I can't point to the specifics. But I assume so.

6 Q In general have the changes which have been
7 requested been made by American Brands and its agencies?

8 A Changes have either been made or some agreement
9 worked out. It is a matter of give and take as you know,
10 when you broadcast, sometimes CBS will say make this change
11 and we will discuss it and change to something else.
12 We have always recognized that this is a fact of life, that
13 you discuss things.

14 Q It is a fact of life that the networks apply
15 policies with respect to advertising content?

16 A That you discuss things back and forth until you
17 reach agreements. That is what I was trying to say.

18 Q In your opinion wouldn't the networks be derelict
19 in their duties to the public and the FCC if they ran
20 false and misleading advertising.

21 MR. KRASH: Do not answer that. That is clearly a
22 conclusion of law as to whether they were derelict or what
23 their culpability or responsibility would be.

24 MR. BYR: Part of the question is would they be
25 derelict to the public.

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cmc 3

1 MR. KRASH: How is this witness qualified to answer
2 that question?

3 You are asking him what would be your dereliction,
4 CBS' dereliction to the public. Isn't that a question you
5 can answer? How can this witness answer that question?

6 MR. DYK: I am trying to get at his familiarity
7 with CBS' policies.

8 MR. KRASH: I don't object to you asking him that,
9 but the dereliction is not a question for this witness.

10 MR. DYK: You have instructed the witness not to
11 answer.

12 MR. KRASH: Yes. I think that is a very improper
13 question.

14 BY MR. DYK:

15 Q Do you believe that it is reasonable for the net-
16 works to work with the NAB in agreeing upon advertising guide-
17 lines?

18 MR. KRASH: Objection. That is improper as to
19 form. And also calls for him to express irrelevant conclusions
20 of law.

21 What difference does it make whether he believes
22 you can agree to that, if it is illegal?

23 MR. DYK: No. The question was whether it was
24 reasonable.

25 MR. KRASH: What does that mean? You are asking
26 for a conclusion of law.

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BY MR. DYK:

Q Do you believe the NAB advertising guidelines serve a useful purpose?

MR. KRASH: Which guidelines?

MR. DYK: In general. On several subjects, including cigarette advertising guidelines as they existed prior to October 21 of this year?

MR. KRASH: Are you referring to the whole set of guidelines? You mean the one about there shall not be excessive violence, for example? Or people with handicaps shall not be attacked unfairly on the air? Those kinds of provisions? It is a 40-page document.

MR. DYK: I am just asking whether in general he believes these guidelines, prior to October 21, 1969, served a useful purpose.

MR. KRASH: His opinion is irrelevant, isn't it?

MR. DYK: Surely the witness has an opinion on that subject.

MR. KRASH: What difference does it make? I don't think his opinion is relevant to this issue.

MR. DYK: You are instructing him not to answer.

MR. KRASH: Yes, I am. Your opinion is not relevant.

BY MR. DYK:

Q Do you agree the networks are justified in having

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1 special concerns as to the truthfulness of advertising where
2 the product may pose a health hazard?

3 MR. KRASH: Don't answer.

4 MR. DYK: Are you instructing the witness not to
5 answer?

6 MR. KRASH: Yes.

7 BY MR. DYK:

8 Q Does your company have a position on the relationship
9 between smoking and health?

10 A Yes. This has been a smoking policy. In our judg-
11 ment health hazards have never been clinically proved, and we
12 simply do not accept the current anticigarette propaganda. I
13 could bring out all of our quotes, but that is the essential
14 thing.

15 Q Am I correct in understanding, then, that your
16 company's position is that there is no relationship whatsoever
17 between smoking and health?

18 A I can't speak for the company position --

19 Q You are on the board of directors, are you not?

20 A Well, we have other things to do.

21 Q Does the board of directors of American Brands
22 formulate that position on smoking and health?

23 A I think the clearest statement would be the state-
24 ment of the chairman of the board in his speech to his stock-
25 holders, which I have given you the essence of.

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1 Q Could you --

2 A I am not a health expert.

3 Q Is the company's position, then, that there is no
4 relationship between smoking and health?

5 A I can't speak for the company position.

6 Q You mean --

7 A On the whole field. I think I could say that is
8 is not a clinically proven relationship in all of the cigar-
9 ette controversy. And I think that is the heart of the
10 statement and the position of the company.

11 Q What do you mean, clinically proven?

12 A Well, when you subject somebody to measles,, you
13 know something happens. This has not been the case in the
14 cigarette business. I don't want to get into this health
15 field. I am not an expert and I think that I would like to
16 state the things that are in my field of expertise, which is
17 the advertising of our products.

18 Q That may be, but as a member of the board of directors
19 of American Brands, it seems to me likely that you are
20 familiar with the company's position. I am not asking you for
21 a medical expert opinion.

22 A I am trying to give it to you as simply as I can.
23 I don't think it would advance the position any to go beyond
24 what I have told you. That is our position.

25 Q When you refer to the relationship, allegedly not

1 having been clinically proven, you mean to say by that that
2 there is not a certainty.

3 MR. KRASH: Don't answer that.

4 BY MR. DYK:

5 Q You mean --

6 MR. KRASH: I mean the witness is obviously not
7 an expert in questions relating to smoking and health.

8 MR. DYK: Mr. Krash, this is a cigarette company.
9 It has been dealing with these questions for years. The
10 witness is a member of the board of directors of that company.
11 The company obviously has a position on the relationship
12 between smoking and health which it has stated on countless
13 occasions. I am trying to find out what that position is.

14 MR. KRASH: He stated it.

15 MR. DYK: That is the only position the company
16 has?

17 MR. KRASH: He made clear it stated it as best he
18 could. Continuous argument with him is not going to elucidate
19 it. You will simply get a continuous argument as to the
20 meaning. It is perfectly obvious the witness cannot amplify
21 much more than what he stated.

22 BY MR. DYK:

23 Q You mean the company has no policy as to the
24 relationship between smoking and health --

25 A I have told you --

1 Q Let me finish the question, please. The company
2 has no position as to the relationship between smoking and
3 health other than that it hasn't been clinically proven?

4 A That is our basic position. I could probably find
5 other statements on it which I don't have simply because this
6 was not my understanding of the area of the discussions here.
7 I have told you what I know about it and that is it.

8 Q That is all you can remember at this time?

9 A Yes. Absolutely.

10 Q Now, you have testified earlier that you are aware
11 that in certain areas the Surgeon General and the press, the
12 opinion has been expressed that there is a relationship between
13 smoking and health. Isn't that correct?

14 A Obviously if you read the papers like anyone,
15 obviously this has been expressed.

16 Q Has American Brands advertising appeared with an
17 eye toward the public opinion on this subject? In other
18 words, in preparing your advertising do you assume that there
19 is a relationship between smoking and health or do you assume
20 there is no relationship?

21 A We don't make any assumption. We prepare adver-
22 tising that is calculated to sell the product.

23 Q So you do not assume, in preparing advertising you
24 do not assume there is a relationship between smoking and
25 health?

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end#18
#19

1 A I don't even think about it.

2 Q Mr. Cohen, even though you joined American Brands
3 in 1964, in the course of your work there and participation
4 in the affairs of the company, have you become familiar with
5 the past advertising of American Brands?

6 A Past advertising of Pall Mall?

7 Q No, just past cigarette advertising in general.

8 A In general of the company, I have seen it over the
9 years.

10 Q Has not the Federal Trade Commission in the past
11 found some of this advertising to be false and misleading?

12 MR. KRASH: Whose advertising?

13 MR. DYK: American Brands.

14 MR. KRASH: Do you have something you want to put
15 in the record to that effect?

16 MR. LOEVINGER: That is a fair question, it seems
17 to me.

18 MR. DYK: Yes. I don't have copies of it, but I
19 can get them.

20 MR. KRASH: I have no objection. Do you want to ask
21 the witness whether he knows whether American was ever found
22 guilty of deceptive advertising?

23 MR. DYK: That is the question.

24 THE WITNESS: I am not aware of it.

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1 BY MR. DYK:

2 Q Are you aware of the past that American Brands used
3 to advertise that twice as many independent tobacco experts
4 smoke Luckies --

5 A What is the year of that, Mr. Dyk?

6 Q The FTC proceeding in which it was found to be
7 deceptive was 1951.

8 A I was not aware of this at all.

9 MR. KRASH: Off the record.

10 (Discussion off the record.)

11 MR. DYK: On the record.

12 BY MR. DYK:

13 Q Are you aware, Mr. Cohen, that American Brands used
14 to advertise that Luckies contain less nicotine or are less
15 irritating on the throat than other leading brands of cigarettes?

16 A Not aware of that.

17 Q Are you aware that advertising was found to be false
18 and misleading by the FTC?

19 A No.

20 MR. KRASH: What is the date of that?

21 MR. DYK: Citation is 47 FTC 1393 1951.

22 BY MR. DYK:

23 Q Now, over the years from the 1930s to the present
24 time have not public attitudes toward smoking changed?

25 A I am not aware of that. There are different people

1 who feel differently about smoking. There are quite a few
2 people who still smoke.

3 Q But the general public --

4 A I don't know what you mean by the general attitude.
5 I don't think there is any such thing. Everybody in the room
6 has an opinion, I suppose. I have one and you have one.

7 Q Are not larger numbers of people concerned today with
8 the health hazards of smoking than was true a few years ago?

9 MR. KRASH: You mean if the witness knows that to be
10 the fact?

11 MR. DYK: If he knows that.

12 THE WITNESS: I don't know it to be a fact.

13 BY MR. DYK:

14 Q Hasn't governmental policy with respect to cigarette
15 advertising changed continuously over the past several years?

16 A Governmental policy in what form?

17 Q Well, just in general, starting with the Surgeon
18 General's report as an example, Cigarette Labeling Act, Federal
19 Trade Commission. Hasn't governmental policy with respect
20 to smoking undergone a change? Surely you must be aware of
21 that.

22 A Well, I am aware of the activity; the policy that
23 is behind it, this is something I don't know. It has happened,
24 yes.

25 Q Now, you have testified that your company has made a

point of advertising tar contents of Pall Mall Gold and Silva Thins in past and present advertisements. Isn't that the case?

A That is right.

Q Why does your company refer to the tar content of cigarettes in those ads?

A The basic reason is this, and let me take just one minute. Beginning with the Roswell-Park report which labeled Pall Mall highest, Pall Mall Gold this was, highest in tar -- incidentally, at that point Roswell was using a different technique and instead of, to put it simply, it is a wet technique of testing, which shows that the technique used by the FTC and our laboratory and other laboratories is the so-called dry method, which I don't totally understand technically, except the end result is the wet method gives higher figures. So the image was of Pall Mall as a tremendously high in tar cigarette.

Beginning at this time and continuing down to October of 1968 in a series of reductions we in fact reduced the tar content of Pall Mall down to the point where it was 19.

Now, to redress the, what we considered the ill done us by the Roswell report, which didn't include any number of cigarettes, it just had a few --

Q What was the date of that report?

A Do we have that date? I believe it was Sept. of '67.

1 So that it seemed to us that we should say that the tar
2 content has been reduced.

3 Now, according to our figures, it went from 28 to
4 19, which is a significant reduction and I don't want to get
5 into the technical ways this was done, because part of it is a
6 trade secret.

7 But the facts speak for themselves; it is on the
8 record. When it got to that point, we felt our job was to
9 say this is now in the range where it is lower than it was,
10 and the simplest way to say it was it is lower in tar than
11 the best selling filter king. And the comparison, when you
12 have an 85 that has more tar than a 100, it is a dramatic
13 difference, it is dramatic in fact in an advertisement.

14 And this seemed to be meaningful to the public,
15 because the sales reacted immediately and in the past year, as
16 I said to Mr. Loevinger, they increased by 10 percent. So
17 apparently the public was interested in hearing this message.

18 Q Did your advertising expenditures on Pall Mall Golds
19 increase over this period, also?

20 A No, they were virtually the same as in the last two
21 years.

22 Q They were the same before the Roswell report and after-
23 wards?

24 A Yes. It has been since its introduction at virtually
25 a steady level.

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Q Why were you concerned that Pall Mall Golds was given the image of being high in tar?

A Because certain people are interested in either a low or medium or half medium, and we have cigarettes in various brands, as you know we have Carlton which is one of the very low ones; we have Montclair in the 15 range; Pall Mall at 19; and some that are higher than that. Like Bull Durhams and so on.

But it is our job, as it is most marketers, not to speculate about what the public wants, but to provide it. That is what we try to do.

Q Why, in your opinion, was the public concerned with the tar contents of cigarettes?

A I can't answer that. Certain people wanted a lower tar cigarette. I can't give everybody's reason.

Q You can't give any of the reasons people wanted a low tar cigarette?

A Not their reasons, no.

Q That didn't enter into your advertising discussions at all?

A As I told you, the simplest answer to that is we have cigarettes in every range and there are people -- there is no question, or we wouldn't be putting out Carlton -- there are people who are interested in a low tar cigarette. Their reasons are their own. I can't -- there are probably a variety

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1 of reasons.

2 Q Does your company ever make any studies or have any
3 studies made as to what the reasons for this might be?

4 A No. We measure virtually all of our marketing on
5 results. We have a very small research department. We go out
6 and find out by putting a brand in a test market.

7 Q Did you ever get a report from any of your adver-
8 tising agencies as to why the public might be interested in
9 having a low tar cigarette?

10 A I don't know of any, no.

11 Q Did you discuss that question with your advertising
12 agency?

13 A No. I have seen studies that say a certain number
14 of people are interested. We have not had interviews in that
15 area to my knowledge.

16 Q But these studies didn't get into the question of
17 why?

18 A No.

19 Q What reaction do you want the public to have to your
20 advertising?

21 A The reaction we want is very simple: we want them
22 to buy the product.

23 Q And having low tar claims in your advertising is
24 designed to get them to buy the products?

25 A Among certain people. There are some people who

obviously don't care about this facet at all, or they wouldn't buy the ones that are higher in tar. In fact they do.

Q Now, you have just testified why you introduced the low tar theme in the Pall Mall Gold advertising. Why was it introduced in the Silva Thin advertising?

A Because when you have a unique or different property in a field where there are 120 different brands, you say something that people are interested in. And Silva Thin had two things going for it. One was that it was a new form of cigarette, and secondly, that it was in the not very low tar range, but in the 15, where there seems to be some interest in cigarettes like Doral and True, which were in the same area.

So that since this was a fact and it was particularly the fact that it was lowest in tar of all 100s, the 100s are the big new field, we said it and the response to it has been good.

Q Does public opinion believe that cigarettes that are lower in tar are less hazardous to health?

A I don't know that. You are asking for an opinion on something that I simply am not an expert on. I don't know this.

Q I just want to know, do you think, have you read articles in the papers and trade press expressing this view?

A No.

1 Q You have never seen anything in the newspapers
2 indicating that there is a segment of the public that believes
3 that a low tar cigarette is less hazardous to health? Is
4 that correct?

5 MR. KRASH: What do you mean by low?

6 MR. DYK: That is your problem.

7 MR. KRASH: That is your question, though.

8 BY MR. DYK:

9 Q Do you believe that, have you never read an article
10 in the paper --

11 A About people believe that low tar cigarettes -- I
12 have never seen that kind of article. What would it say? I,
13 don't know what you are referring to.

14 Q Indicating that the lower the tar of a cigarette,
15 the less hazardous to health. You have never seen such an
16 article?

17 A It is possible that I have seen such an article.
18 This has been said. I don't subscribe to it, but it is not
19 impossible that I have seen it. I have just never seen it put
20 that way.

21 Q Now, when American Brands was a member of the
22 Tobacco Institute Code, it did not run --

23 A The Tobacco Institute Code?

24 Q The Tobacco Code administered by Governor Miner.

25 MR. KRASH: Cigarette Advertising Code.

cmc 1

BY MR. DYK:

20

Q Cigarette advertising code.

Did it advertise low tar and nicotine cigarettes using that theme?

A Did Silva Thins have that theme?

Q Yes.

A I don't believe we were in the code. I am trying to correlate the dates of our --

MR. KRASH: We left the Code August 9, 1967.

THE WITNESS: We left in August 1967 and this is almost at the time -- they may have been launched before -- the advertising would be after the Code, though.

BY MR. DYK:

Q So while you were a member of the Code you abided by the Code and did not advertise low tar and nicotine cigarettes as such?

A I forget the copy and Carlton frankly at that point.

But we were advertising Carlton and we were in the Code. I forget how it was said. But this was the whole story of the Carlton, so it must have been said in some form. I don't recall exactly how.

Q If you can remember the provisions of the Code, didn't it bar the members of that Code from advertising on certain television programs?

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cm2

A Yes.

Q Can you describe which programs it barred?

A They were programs, as I recall it, that appealed basically to youth and there was a formula under which we voluntarily pulled out of shows when the youth audience increased.

Q Have you ever communicated with anyone at Lorillard or Reynolds Tobacco Company as to their intention of complying with the new NAB-FTC policy?

A No.

Q You don't know what their positions are?

A I have no idea.

Q Are you familiar with the NAB Code Authority guidelines pertaining to tar and nicotine advertising as they existed prior to October 21, 1969?

A In general terms. I would have to look at them if you have them there and want me to comment, I would like to see them. I don't remember them in any detail.

Q Do you remember that they barred tar and nicotine advertising at one point?

A There was a point, and I think up to the point when the Federal Trade Commission changed its position.

Q And you complied with the NAB Code before the Federal Trade Commission changed its position?

A I have forgotten, I assume so.

Q Are you familiar with the recent amendments to

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cnc 3 1 the NAB guidelines pertaining to tar and nicotine that
2 became effective January 1, 1970?

3 A Yes, I am.

4 Q Do those guidelines preclude tar and nicotine
5 advertising?

6 A They don't preclude it, they surround it with so
7 many requirements that we find it impossible to state them
8 in the way that we can advertise properly.

9 Q Can you describe the requirements of the new NAB-
10 FTC policy for us?

11 A Well, wasn't that basically in the statement that
12 I read to Mr. Loevinger? I think everything was there,
13 or that was my understanding, that we would be required to say.
14 Did you hear me read that?

15 Q Yes, but if you could just state the policy more
16 generally. I don't particularly want to hear you read the
17 language again. Just describe it for us.

18 A Well, if you mention low tar you have to put in the
19 high and the low tar and nicotine, the range and you have to put
20 in the tar and nicotine content of the cigarette you are
21 describing --

22 Q If you describe a cigarette. If you compared it to
23 a specific brand?

24 A No, if you do it at all. If you say low or lower,
25 you have to put in the range. That is our understanding.

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cmc 4

Q Could we take a look at the October 8 letter?

What exhibit is that? It is Plaintiff's Exhibit 8
(handing to witness.)

Now looking at that, paragraph 3, page 2, would you
read that to us?

A "The tar and nicotine content in milligrams
of the lowest and highest yield on cigarettes."

Q Paragraph 3?

A "And if the tar and nicotine content of the
advertised cigarette is compared to any other specific
cigarette, the brand name and tar and nicotine content
in milligrams of the smoke produced by such other cigarette."

Q Don't you read that as not suggesting that
the other brand has to be named unless there is a comparison
to a specific cigarette?

A I am very sorry, I don't know what you are driving
at here. If as a category --

Q Take Silva Thins advertising that is currently
running.

A Silva Thins advertising that is currently running
says lowest in tar of all hundreds. That is a category,
but it would still have to put, according to the guidelines,
in both audio and video, the highest and lowest range of tar
and the highest and lowest range in nicotine. That is the
intent, isn't it? I mean --

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cmc 5

Q Would it require naming a competitive brand?

A No, because there is none. You can't name 90 brands. This is the understanding that I have had, that if it is a sweeping category, and that is the discussion that was held with your own clearance men, on this subject of how many are "many" as I understand it. It is when it is a category of this kind, you obviously don't name every hundred cigarette, you just name the highest and lowest in audio and video.

Q But you don't have to name a competing brand.

A No, according to this letter.

Q If Pall Mall Golds were to change its advertising so that it compared itself, for example, to many of the lower, lower in tar than many popular filter kings, it would not have to name a specific brand, would it?

MR. KRASH: Is this CBS policy?

MR. DYK: It is just a question.

THE WITNESS: I don't know the answer to that, what it would be. That would have to come from you people or the other networks.

BY MR. DYK:

Q You just testified in your interpretation the Silva Thins advertising would not have to be changed?

A When it is a total category and there is no question about it, I understand there you put the high and low

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cnc 6

1 range.

2 Q But you have a question if it refers to many
3 popular or many of the most popular filter kings?

4 A I don't know.

5 Q Now until recently am I correct in understanding
6 that it has been the policy of American Brands to bring its
7 television advertising into compliance with the provisions
8 of the NAB Code?

9 A I don't -- we bring our advertising into com-
10 pliance with the networks, what they do with the Code is bas-
11 ically their problem.

12 Now I assume that the networks abide by the Code
13 provisions and we abide by what the networks tell us we can
14 or can't do. So I am not, you know, we are responding to the
15 network position. We are not responding to your trade
16 association.

17 Q Isn't it true American Brands or its agencies
18 have consulted directly with NAB?

19 A On occasion, yes. And on the most recent occasion
20 was at the request of one of the networks, I believe CBS
21 as a matter of fact.

22 Q Isn't it true that when these consultations have
23 taken place they were because American Brands or its agencies
24 objected to the interpretation of the NAB Code or its guide-
25 lines, suggested by the network?

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cmc 7 1 A No, what the origin of these things is I simply
2 don't know. I suppose the network raises it with the
3 Code and they come back and say tell them this, and on occasion
4 it ends up where two or three of the parties get together
5 and try to work it out.

6 Q But you don't know?

7 A I know that on one occasion, on the Fall Mall
8 and the pointing to the tar range, that was worked out
9 directly with Helffrich, and I believe the suggestion of
10 Mr. Nelson.

11 Q Did anyone from CBS participate in those dis-
12 cussions with Mr. Helffrich?

13 A I don't believe so, I am not sure.

14 Q So the discussions took place between American
15 Brands agencies and the Code Authority?

16 A I believe that is the way it happened, yes.

17 Q Aside from the recent amendments to the NAB
18 guidelines which are in issue here, does your company intend
19 to comply with other requirements of the NAB Code and the
20 guidelines in the future?

21 A It depends on what they are. You can't predict
22 something like that.

23 Q Well, you know what the existing guidelines and
24 policies are, aside from the one that is involved here.

25 A But I don't know what you are referring to, in the

cmc 8

1 future.

2 Q The existing, in your future advertising?

3 A In our future advertising --

4 Q Assuming no change in existing guidelines and
5 policies, putting to one side the policy at issue here,
6 do you intend to comply with NAB policies?

7 A Well, it is difficult for me to answer.

8 Let me ask you, I don't understand, we are apparently
9 complying because we have material on the air which the
10 networks have cleared and they are abiding by the NAB
11 policies.12 Again, I say to the best of my knowledge, because
13 I don't know what goes on between your networks and the NAB,
14 but I have got to assume that that is happening.15 Q But you don't intend to change your policy in that
16 respect, aside from the one issue that is before us in this
17 case?

18 A I just don't know.

19 Q Have you discussed changing your policy in that
20 respect?

21 A No, absolutely not.

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Q Now does your company in general run different advertising on ABC, CBS and NBC?

A No, we run generally advertising that is the same across the board.

Q You use the same commercials?

A Yes.

Q Is it important to you to use the same commercials?

A Yes, it is.

Q Well, if it is important to run uniform commercials, isn't it important to have NAB interpretations on the Code, so all three networks have a uniform interpretation of the Code?

A I would think that that is your, you know, if your Code and the networks feel that way. I don't know what you mean important to us.

Q To enable you to run uniform advertising on the three networks?

A If there were no restrictions, I suppose we could run different things everywhere, but I don't imagine you would do it. The heart of any advertising is to be consistent. This is Code aside. You don't have a Marlboro man in one section of the country and an English butler in another selling your product. You do it, particularly in any mass product, you try to be consistent.

Q Well, let's take the area of athletic activity, for

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example. If ABC took the position that shuffleboard is not an active sport and that you can show someone playing shuffleboard and CBS said no, you can't show someone playing shuffleboard, both interpreting the NAB guidelines, wouldn't it be important to resolve that discrepancy?

A From our point of view, yes, I don't know how it is arrived at, but we certainly don't want to be making, I think it is self evident, we don't want to be making different commercials for each network or for every station. We get one that we want to run across the board.

Q Now earlier in your deposition, Mr. Loevinger was examining you and you testified that certain changes had been made earlier this year I believe in the Pall Mall Gold advertising as a result of certain consultations with NAB personnel. Can you describe for us in detail those changes?

A I think it is fairly simple. It was that the networks felt that the actual positioning of Pall Mall should be more clearly indicated in the spectrum. The result of it, not getting into the several meetings and the agency going back and forth, but the result was that the pencil pointed to the position of Pall Mall on the chart and the NAB agreed to this, and it was worked out and Stockton Helffrich wrote a letter of thanks to Mr. Al Seamon, president of SSC&B and thanked him for cooperation and that was it. And it has been on the air in either the pencil form or there is one with the girl

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pointing to the position on the FTC chart.

Q It is possible to read either the names or the figures on that FTC chart?

A No, it is a matter of showing the position.

Q In fact, wasn't the chart itself added to the advertisement at an earlier time as a result of some consultations with NAB?

A There may have been a chart before, I don't remember the details, where -- I remember the important decision there was to point to the position. And that was done and this is basically what has been on since then.

Q You mean the chart was in the earlier ads but there was no indication of position?

A Yes. And I think that was the basic change that was made.

Q Now until 1966 you stated earlier, if I am correct, you recognized that FTC had a policy against tar and nicotine advertising. Isn't that correct?

A I believe that is correct.

Q And you abided by that policy, didn't you?

A To the best of my knowledge, yes.

Q American Brands --

A I am trying to think when and what the nature of the Carlton advertising was. It was very limited. But since we showed the tar content on the package -- but the basic

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thing to cut through it all is that March 25, '66, the FTC reversed its position as to the permissibility of advertising tar content and the Commission announced, as you know, I won't read this whole thing, but a factual statement and so on, these elements.

Q Could you undertake to find out for us whether the earlier Carlton advertising mentioned tar and nicotine?

MR. KRASH: Sure.

THE WITNESS: Yes.

BY MR. DYK:

Q Now American Brands never challenged the FTC policy against tar and nicotine advertising, did it?

MR. KRASH: What do you mean by challenged? You mean brought a suit?

MR. DYK: Yes, brought a suit.

BY MR. DYK:

Q Did you ever bring a suit?

A Not to my knowledge. I will undertake to check the advertising. I just forget it. How do you want me to do that?

MR. DYK: A letter to Mr. Krash would be fine.

THE WITNESS: I will undertake to assemble the advertising and get to Mr. Krash as soon as possible.

BY MR. DYK:

Q In fact in 1960 American Brands and a number of

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1 other tobacco companies at the prompting of the FTC
2 agreed not to engage in tar and nicotine advertising, isn't
3 that true?

4 A Yes.

5 Q Now that FTC policy was far more drastic than the
6 policy at issue in this case, wasn't it?

7 A You mean to do none as against doing one with so
8 many things you can't do it? It is a touch and go.

9 Q Are you aware of the 1967 exchange of correspondence
10 between the NAB and the FTC which is Exhibit NAB-7?

11 A The October 8?

12 Q No, this is 1967.

13 A No, I don't have that.

14 Q (Handing exhibit to witness.)

15 A Do you want to refer to any specific part? I have
16 just glanced through this. Do you want me to read the
17 whole document?

18 Q You may read it to see if you have been familiar
19 with it in the past.

20 A I have now read this.

21 Q You are familiar with the document?

22 A Yes.

23 Q Now the FTC's October 25, 1967 letter states,
24 doesn't it, that where comparisons of tar and nicotine content of
25 other brands of cigarettes are made, the advertising should be

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factual, fair and not misleading?

A Yes.

Q Did American Brands comply with this policy in the past?

A Yes.

Q And it didn't challenge the policy?

A Well, I assume there was no reason to, because we were conforming. If we weren't, we wouldn't have been allowed to do our advertising. Isn't that correct? Wouldn't the network have said no, this is against -- I don't know, we probably were conforming.

Q We didn't prepare your advertising.

A It was prepared and accepted by the network. So I assume it conformed.

Q Though on occasions I suppose objections and requests for changes were made by the networks?

A It could have been, but it wasn't run until it was approved obviously.

Q Now that FTC policy also stated a cigarette testing relatively high, not among the lowest in tar and nicotine yield, should not be represented to be otherwise either expressly or by innuendo. Did American Brands comply with that policy?

A I take it they did.

Q And it didn't challenge that policy, did it?

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A No.

Q The FTC policy also states a cigarette testing relatively low, along the lowest in comparison with other brands, may be so represented in advertising to the public, provided the basis for comparison is fully and fairly stated. Is that correct?

A Yes.

Q American Brands complied with that policy?

A I take it we did.

Q And it didn't challenge that policy, did it?

A Not to my knowledge.

Q Now finally the FTC policy statement states that no matter how relatively low its tar and nicotine content, no cigarette may truthfully be advertised or represented to the public expressly or by implication as safe or safer?

A Right.

Q Did American Brands comply with that policy?

A Yes.

Q And it didn't challenge that policy, did it?

A No.

Q Do you confer with Mr. Hetsko on the subject of advertising?

A No, except when there is some problem of the type we are facing here, we do not confer with Mr. Hetsko.

Q But where there is a question such as there is here,

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you do confer?

A If a question were raised that involved the legal department, we would certainly confer with our senior vice president and general counsel, yes.

Q Have you conferred with Mr. Hetsko about the proposed changes in the NAB Code?

MR. KRASH: Don't answer that. He is now asking you about a privileged area of communication.

BY MR. DYK:

Q Are you aware of Mr. Helffrich's October 13 and October 22 letters to Mr. Hetsko?

A Yes, because Mr. Hetsko transmitted them to me.

Q I am puzzled, I confess, by the documents that were submitted this morning. I would like to make Bergson's letter an exhibit.

(CBS Exhibit 8 was marked for identification.)

MR. DYK: I appreciate that in view of the time frame here that you have not made certain that you have all of the relevant documents. But it seems sort of strange that there are no documents relating to the FTC policies and NAB guidelines, at least as I reviewed the documents there are none. Mr. Cohen has just testified that there was some correspondence --

MR. KRASH: There is a letter already in the

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record.

THE WITNESS: If you are referring to the letter between FTC and Helffrich of October 8, that is part of the record.

MR. DYK: But I am speaking also about internal memoranda on this subject, things of that sort, correspondence with agencies.

THE WITNESS: I don't know of any. Whatever we have as far as I know you have.

MR. DYK: Could Mr. Krash undertake to check specifically on those two things again?

MR. HAWKE: The people who made the file search assured us that they produced everything that met this description.

MR. DYK: Could you check with them on those two points?

MR. HAWKE: Sure.

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BY MR. DKK:

Q Now when did you become aware of the October 13 and October 22 letters from Mr. Helffrich?

A The ones that were sent to Mr. Hetsko?

Q Yes.

A It was either the same day or the day after Mr. Hetsko sent it immediately, to the best of my knowledge.

Q And you reviewed those letter at the time?

A We read them, sure, certainly.

Q And it was your understanding on your initial reading the same as your understanding now as you described it?

A Well, the reading of the letters versus what went on following the receipt of them and the interpretations beginning with the changes in the Code that Helffrich transmitted to Mr. Hetsko, it looked as if the Code said these are the provisions that are going to be made a part of the Code procedure.

Then there began to be -- and I'm not probably doing this day by day justice -- but the essence of it was over a period of time some people thought you had to put in audio and video and some video only.

And It was not until I believe December 3 that we were aware that everybody was going to abide by the FTC letter literally. And I might point out that even as of December 17 and the hearings here, the CES clearance man had just gotten a

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1 decision that you could, if you compared a brand, name the
2 competitor. And that was said by the CBS man on the stand,
3 that his decision came on December 17. So that literally all
4 three networks were abiding by the whole FTC document, that
5 was the time when the final word came in.

6 Q Aside from your confusion as to whether disclosure
7 in both audio and video was required, were you confused --
8 Mr. Krash, let the witness answer without instruction.

9 MR. KRASH: There was a misstatement. He didn't
10 speak of his confusion, there was general confusion.

11 BY MR. DYK:

12 Q Aside from the general confusion at American Brands
13 of whether you had to do this in both audio and video --

14 MR. KRASH: That is also a misstatement. It wasn't
15 just at American Brands. He said throughout the industry
16 there was general confusion about this.

17 BY MR. DYK:

18 Q Aside from the confusion in that one area --

19 MR. KRASH: What area?

20 MR. DYK: As to audio and video. I'm not interested
21 in who was confused; Mr. Cohen testified there was confusion
22 at American Brands; aside from that one area was there any
23 other confusion at American Brands as to the meaning of the
24 FTC policy and the NAB guidelines?

25 THE WITNESS: I think that was the heart of it. I

1 think that's correct.

2 BY MR. DYK:

3 Q There was no other area of confusion?

4 A No.

5 Wait a second. There was one other point, I'm
6 sorry, I'm so tired at this moment, I will try to recollect.

7 Q Did American Brands or the agencies prior to Decem-
8 ber 3 seek any clarification from the NAB or any of the net-
9 works as to whether these requirements applied to both audio
10 and video?

11 A No; now let me, since this has come up, let's take
12 one second. The normal procedure, I don't speak for other
13 companies than our own, when there is a change for whatever
14 reason and from whatever source, we are advised by the net-
15 works with whom we place our material that this is what you
16 are to do. It is as simple as that.

17 And there is no reason for us to be racing to the
18 network and saying what is new when they have made a deter-
19 mination. I repeat to you that the CBS clearance man couldn't
20 have come to us until December 17 and said okay now I have got
21 clearance for you to put in Winston. So that this is a net-
22 work responsibility, if they change the ground rules, to tell
23 us.

24 And when we ask them can we run this advertising,
25 they say yes or no. So if they change the name, it is their

job to run over and say what are you thinking today.

Q You mean --

A I mean just that.

Q If current advertising becomes unacceptable, the networks have invariably taken the initiative in informing you of that.

A I know of no occasion when they haven't.

Q Do you know of any occasion when they have?

A I think in the case of pointing out the position of Pall Mall on the chart, that is the most recent and per example. They said we think this ought to be made clearer and the initiative for that came from the network.

Q Is that the only example you can recall?

A At the moment, yes.

Q Now after you first became aware of the changes in the FTC policy and the NAB guidelines, did you have any conversations on that subject with anyone in the company?

A Yes, I discussed it with my superior.

Q Who is that?

A Mr. Heinmann. And he supported my position that if there were any further action we should be told what the intent was.

Q What do you mean by that?

A Well, of the people who were carrying our advertising, I am repeating my other remark, that if the networks

were going to say to us the advertising which we have accepted is no longer acceptable, and this is what you have got to do, and then it should have been said.

Q You are aware that each of the networks subscribed to the NAB Code and abides by the guidelines?

A Right.

Q Has any network in the past ever run any advertising which was finally determined not to be in compliance with the guidelines?

A Not to my knowledge, but you are talking here about the matter of interpretation, which I repeat --

Q I understand the matter of interpretation.

A It took quite a while, even for the people who were basically involved, to take a position.

Q But there was never any doubt in your mind that once the guidelines were interpreted the networks would abide by them?

A That was not my position one way or the other. That is the networks' problem. I don't have -- that is not something I should have an opinion on.

Q You are not concerned with whether your advertising

--

A I'm concerned with the networks' clearing our advertising, and what they do in relationship to their trade association is their business.

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Q Yes, but when this new FTC policy and NAB guidelines came out, you were concerned whether your advertising would be cleared, weren't you?

A That is correct.

Q And aside from the area of confusion that you mentioned, you had no doubt, did you, that the networks would abide by the guidelines?

A I would assume the networks would abide by their Code. I just say that that is their problem, not mine. They may not sometime. If you are asking me as a general matter, I assume they would, yes.

Q What was the date of your discussion with Mr. Heinmann?

A It would have been shortly after, I don't remember the exact date, but shortly after the receipt of the communication from Mr. Helffrich.

Q The October 22 communication.

A Yes.

Q Now I'm somewhat confused because as I understand it you testified earlier that the FTC complaint against American Brands and the NAB policy, FTC policy in this area, are identical. Is that correct?

A This is --

MR. LOEWINGER: That is what the complaint alleges.

THE WITNESS: This is in the complaint. This is a

legal problem. May I consult Counsel?

MR. KRASH: Yes.

THE WITNESS: Yes, all right. Yes.

BY MR. DYK:

Q In fact I ask you to examine the complaint and the October 8 policy statement and ask you if you wish to change your answer in that respect?

A I'm sorry, look at what?

Q The FTC complaint --

MR. KRASH: That is really a question for a lawyer, whether they are similar, or different. This witness isn't capable --

MR. ADLER: He verified the complaint --

MR. KRASH: But any lawyer knows there are legal conclusions inserted in the complaint.

MR. DYK: It is not a legal conclusion.

May I ask him this question.

MR. KRASH: Yes.

THE WITNESS: Please show me where to look.

BY MR. DYK:

Q The October 8 FTC policy statement.

A The October 8 policy statement of Mr. Helffrich.

Q Yes, and the FTC complaint against American Brands?

A Well, they look substantially the same to me. I'm not a lawyer. If there is something you are calling attention

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to, I wish you would do it.

Q There is no mention of disclosure of nicotine content in the complaint, is there?

A Now, this is an interesting point. This was one of the other points of confusion that came up. There were early reports and discussions that came back that nicotine wasn't part of it. When finally all of the smoke settled, nicotine was part of the story. Now this lack of it may have come from this.

Q But there is no mention of nicotine in the complaint.

A All right, there is no mention of nicotine in the complaint.

Q And nicotine is mentioned in the October 8 policy statement. Is that correct?

A That is correct.

Q So the two are not identical, are they?

A They are not.

Q And the verification of the complaint was incorrect in that respect. Is that true?

A I suppose it is.

Q Now there is another differentiation, is there not between the complaint and the October 8 policy statement? That is, the complaint says nothing about requiring disclosure in audio and video, does it?

MR. KRASZ: It depends on what you mean by

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disclosure, doesn't it?

MR. DYK: I suppose it does. But it doesn't specifically say audio and video.

MR. KRASH: You can argue that with a lawyer. You are harassing the witness and keeping him here with trivial things. The substance is clear and correct and the witness is not a lawyer, he is a layman, who on advice of Counsel puts insertions in with respect to these two matters. Every competent lawyer knows that, I assume you know it.

BY MR. DYK:

Q Now it is true, if we may get back to the question, that the complaint says nothing about audio and video.

A That is correct.

Q And the policy statement does, right?

A That is correct.

Q Now when you become aware of the September 29 complaint against American Brands, did any FTC press release accompany that complaint?

A I don't recall.

MR. DYK: Off the record.

(Discussion off the record.)

MR. DYK: Would you mark this CBS Exhibit 9, please.

(The document referred to was marked CBS Exhibit No. 9, for identification.)

BY MR. DYK:

Q I show you a document marked CBS Exhibit 9 which purports to be a press release of the Federal Trade Commission, dated November 10, 1969, with respect to the complaint against American Brands.

Have you seen that press release before?

MR. KRASH: That is about the answer, not about the complaint.

MR. DYK: About the proceeding.

BY MR. DYK:

Q Have you seen that?

A I have not seen this document, no.

Q Have you ever seen any FTC press release concerning the proceedings against American Brands other than the May 22 press release?

A No, I have not seen any press release of the FTC.

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BY MR. DYK:

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Q Now, Mr. Cohen, earlier I believe that you testified that American Brands sought to induce the public to purchase Silva Thins and Pall Mall Gold 100s by making representations that these cigarettes were low or lower in tar. Is that correct?

A That is one of the elements, yes.

Q What is the current policy of American Brands with respect to advertising that discusses tar and nicotine content?

A I don't understand what you mean by the policy. We do it in certain products and that speaks for itself, doesn't it?

Q Do you have any company policy with respect to the contents of such advertising?

A We don't have company policy in advertising. We make up an ad to suit our problem and it varies from product to product. There is no uniform way of doing any advertising.

Q You have no policy then with respect to the contents of tar and nicotine advertising, other than that which may emerge in a particular case?

A That is correct. If it is helpful in selling, we put it on within the rules you live with.

Q Is there any particular element of the new NAB guidelines, FTC policy, which is of particular concern to

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American Brands?

A Well, haven't we been over that? Do you want me to repeat all of this again?

Q This is just -- I would appreciate it.

A I have stated this so many times. I will do it of course. I tried to point out when I was being interrogated before that the physical problem of putting in an audio and video, the things that are required under this, make it impossible to develop a meaningful 30 second commercial and 30 second commercials are the heart of our business.

Q Is there any other objection to the FTC policy, NAB guidelines?

A Yes, there certainly is, naming a competitor is contrary to all practice in advertising, and has indeed been against the policy of certain two of the networks, and I don't know the position of the third, but it is against all advertising practice to name a competitor in your advertising.

Q Are there any other objections to the NAB FTC policy?

A I can't think of any, no. There may be, but it seems to me that is the heart of it.

Q So you have no problem about disclosing the figures that are required in the video portion of the advertisement? Video?

A Well, it depends on the nature of it. Again this is a hypothetical question, because if you put separate tar and

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1 nicotine, or what form it takes, all of these things,
2 whether it can all be done in one commercial. I am telling
3 you what I think the key problems are, I have expressed them.

4 Q Do you have a problem with disclosing these figures
5 in the video portion of the advertisement?

6 A I think this is something that could be discussed.
7 I have never addressed myself to that.

8 Q Why do you object to naming a competing brand in
9 your advertising?

10 A Because when you name somebody else, with the
11 casual way many people look and listen and read, you
12 promote the other person, just as politicians seldom name
13 their opponents by name, they call him "that fellow."

14 Q Is your current Pall Mall Gold 100s -- strike
15 that. Is your current Pall Mall Gold 100s advertising
16 designed to indicate that these cigarettes are preferable to
17 the best selling filter king?

18 A No.

19 Q Why is the comparison made?

20 A Because it positions it as a cigarette in the
21 modest tar range and compares it with the best selling
22 filter king.

23 Q So the ad is not designed to encourage smokers to
24 switch from their present filter king to Pall Mall Gold 100s?

25 A Absolutely not. In the general field. But that

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1 isn't the question you asked me before. When you put an
2 ad out, you want to take smokers from everybody. You are out
3 against the whole market.

4 Q If you are comparing tar, what is the relevance
5 of the fact that you are comparing it with the most popular
6 cigarette?

7 A Because it positions it in the spectrum.

8 Q But that may have nothing at all to do with
9 relative tar content, the best selling filter king could
10 be very high in tar content or it could be very low. Isn't
11 that true?

12 A That isn't the situation.

13 Q Does the public know that?

14 A I don't know what the public knows.

15 Q Does the public know what the tar content of the
16 best selling filter king is?

17 MR. KRASH: The advertisements state it.

18 MR. ADLER: Let him answer.

19 THE WITNESS: We put it on the screen, don't we?
20 guess they do.

21 BY MR. DYK:

22 Q Does the public know where the best selling filter
23 king ranks with other cigarettes in tar content?

24 A We make an effort to point it out in our
25 negotiation with your network people and the NAB, we arrived
26 at what we think shows where it ranks.

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Q How does the ad indicate where the best selling filter king ranks in tar, other than a number?

A It points a pencil to the position on the FTC chart where this ranks.

Q Which? What is "this"?

A Pall Mall.

Q Does it point on the chart to where the best selling filter king ranks?

A Oh, I don't know, I don't think so.

Q Now in the current Silva Thins advertising there is no chart, is there?

A No.

Q How does the public know where Silva Thins ranks?

A It is a generic thing, it is the lowest in tar of all 100s and that tells, that is the heart of the story. And it is lower than most kings, that is an added statement and it is indeed lower than two-thirds of the kings. So that is conclusive enough.

Q Is Pall Mall in fact a low tar cigarette?

A It is not in the low, low tar range, no. It was never meant to be.

Q Is Silva Thins a low tar cigarette?

A Silva Thins is in the medium low along with True, in that area.

Q What is the tar content of Pall Mall Gold?

1 A Nineteen.

2 Q What is the tar content of Silva Thins?

3 A Fifteen.

4 Q Now isn't it true that according to the FTC
5 recent figures for all cigarettes that the tar content
6 ranges from 32 milligrams to 4 milligrams?

7 A I understand that is true, yes.

8 Q In fact, according to these November tests that
9 were just released, aren't there 54 cigarettes that are lower
10 in tar than Pall Mall Gold 100s?

11 A If that is your count, I will accept it.

12 Q According to the November test results, aren't
13 there 22 cigarettes that are lower in tar than Silva Thins?

14 A Repeat that again. 2200 millimeter?

15 Q No, 22 cigarettes.

16 A That are lower --

17 Q Whatever size, that are lower in tar than Silva
18 Thins?

19 A If you counted that, I will accept it.

20 Q Now you said that Pall Mall Gold was never designed
21 to be a low tar cigarette. Isn't it true that it is relatively
22 high in tar?

23 A I wouldn't think so. The 19 range is -- what I
24 explained before, which is very important, that part of this
25 story is the story of the reduction from the figure in the

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public mind, which at one time was a 43, but from the beginning of the same method, from 28 to 19 is a cigarette reduction.

Q Is that what the advertisement is supposed to convey, that Pall Mall Gold 100s are lower in tar than they used to be?

A That is part of the story, yes.

Q Do you believe that consumers choose among different brands of cigarettes on the basis of nicotine content?

A It could be, I am not aware of it. The tar has been the term that is most often used. In fact we didn't, we don't use nicotine. Tar seems to be the thing that people consider, at least that is advertised.

Q Didn't you used to advertise that Silva Thins were low in nicotine?

A I think it said lowest in tar and nicotine of all hundreds.

Q The current advertising supplies no information as to nicotine content?

A That is correct.

Q Do you think that people who watch television are always watching the screen? People who are following a television program, do you think they are always watching the screen?

A Not every second, I would assume not. If I take it

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from our own experience, yours and anybody's, sometimes you walk away.

Q So there are times when a listener is not watching, but is only hearing the video audio?

A I would think this is quite possible.

Q Don't you think the viewer who is listening but not watching who wished to be apprised of the position on the chart of Pall Mall Gold 100s, if he hears it is a low tar cigarette in the audio --

A We don't say it is a low tar cigarette in the audio. We say lower in tar than the best selling filter king.

Q And then you point on the chart to where that is?

A Yes.

Q I presume that you have the pencil pointing to the chart because you believe that is relevant? Is that true?

A Sure.

Q Why isn't it relevant for someone who is not watching the screen, but is only listening to the audio?

A Well, you can't do everything, you have got to assume that when you put a demonstration on people are going to be watching it. And by and large I am sure they are. They don't run away all of the time.

Q I don't believe that you supplied this information earlier, I wonder if you could tell us what the current

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advertising budgets of the other American Brands cigarettes are, Lucky Strike, Carlton, Tarryton, Pall Mall Red?

A I will give you an approximation. I don't have the figures with me. Go down the list one by one.

Q Lucky Strike?

A A million and a half dollars.

Q Carlton?

A A million and a half dollars.

Q Tarryton?

A \$14 million.

Q Pall Mall Reds?

A Zero.

Q Now just to get back to one question for a moment. In NAB Exhibit 31, the December 3 letter to Mr. William Moore from Mr. Corey Allen, in which he states on page 2, the top of the page, that American Brands "had no desire to show or sell" -- that is presumably Pall Mall Gold 100s -- "as a low tar cigarette." I take it that that is true?

A Yes.

Q Is American Brands a member of the Tobacco Institute?

A No.

Q When did it withdraw as a member?

MR. HAWKE: This is all in the record.

MR. SWAN: Off the record.

(Withdrawn and the record.)

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BY MR. DYK:

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Q What is the date that American Brands withdrew from the Tobacco Institute?

A I don't know.

Q Was it recently?

A Let me be clear. Are you talking about the Tobacco Institute or the cigarette advertising code?

Q The Tobacco Institute.

A All right. This is something I don't know.

Q But it was not recently?

A No. It was --

MR. LOEVERING: I think the dates are in the record.

MR. DYK: Thank you. That is all.

BY MR. ADLER:

Q I apologize, Mr. Cohen, for --

A I want to continue. Because we must get Mr. Moore out of here, so go right ahead.

BY MR. ADLER:

Q Earlier in your interrogation I believe by Mr. Loevinger you referred to a fact booklet that you didn't have with you which if you had had with you would have helped you to answer one of Mr. Loevinger's questions. What is the nature of that booklet?

A I am sorry, I don't remember the point a fact

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cmc 2

booklet.

Q It was a fact booklet that must have had facts in it about the company.

A This was when we were asked the position or I was asked the position of the company on the health issue and I said it was contained in statements by the now chairman of the board and they are in the annual report.

Q No, I don't believe that was it.

MR. LOEVINGER: I think it had to do with the sales of various products.

BY MR. ADLER:

Q I believe it did. It was apparently a little booklet you sometimes have with you which contains some basic fact data in it about the company.

Is there such a document?

A There is a "Sold American", a little booklet about everything we do. But there is nothing with figures in it.

Q Perhaps when we get the transcript we can see what the reference is. If that refreshes somebody's recollection and I had the booklet, we I think would like to have it made available.

MR. LOEVINGER: May I make a suggestion?

What about the last annual report of the company?

Can we have a copy of that for the record and for each counsel?

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cmc 3

MR. KRASH: Sure.

MR. LOEVERING: That may have some of this data.

MR. ADLER: Let's reserve on the other until we see what is in the transcript.

BY MR. ADLER:

Q Mr. Cohen, you testified I believe during your previous interrogation that the NAB guidelines were one of the great problems you dealt with in your position at the company.

Do you recall saying that?

A I don't believe I did. I said that essentially that we look to the networks to tell us what they are doing and what we can do in our advertising, and as a result of the NAB guidelines which I assume they follow.

Q So what you are saying is the impact of the NAB guidelines on you was indirect, as it influenced the networks in their policies. Is that correct?

A That is correct.

Q Let me ask the question this way: Was the matter of complying with the networks requirements for advertising copy which in turn was dictated to the networks by the need to comply with the NAB code and the NAB guidelines, a major problem for you in carrying out your responsibilities?

A If you could be specific and say in what area, I don't want to -- you know --

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Q I mean in the area of television advertising.

A Well, let's not have a picture of this just constant problem. By and large advertising is submitted and sometimes slight changes are made, sometimes not. So that unless you are specific about a problem or area, there are always problems in clearing advertising, sure.

Q Let me try to be more specific. As a consequence of the NAB guidelines, were there not certain areas of advertising that were foreclosed to you, certain types of campaigns that you might otherwise have elected that you could no longer run?

A It is conceivable. I can't think offhand of an occasion when there would be a thing like this. I would have to know specifically.

Q But weren't there some rules about the way in which cigarette smoking could be portrayed, the age of the people, the type of activities of the people?

A These are things we have been aware of, but they have not been that onerous, I wouldn't think.

Q Why have they not been that onerous?

A Because when they are onerous, they are not onerous. And when they are, they are.

Q Isn't the reason that you were able to devise other campaigns that were attractive and sold your product within the limits, within the parameters set by the guidelines?

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A Well, this is so general.

Q But it is true, is it not?

A Don't say is it true or isn't it true. What is or isn't true. You make, when you have problems, you try to make adjustments on occasion and you do and sometimes if you can't you withdraw it. But I cannot sit here and think of a specific occasion for two reasons. One, I don't get into the day to day exchange with the networks, so that I don't know the details of these adjustments and changes very often.

Q Who would be concerned with that more directly? You advertising agencies?

A The agencies. I am not saying that what is done I don't finally approve, because I do, that is my responsibility. If there is a discussion back and forth and something comes out of it, I am the one who has to say Go or No Go.

Q Are you responsible for selecting the agencies used by the company?

A Partly, yes. I do it in conjunction with the president.

Q What are the criteria for selecting the agencies?

A Partly their track record, very often they come in and make a presentation of advertising which is so good that we hire them on that basis. The chief one is reputability, stability, and above all, what they have done in our and other

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cmc 6

areas.

Q I believe there was testimony that when you went to your present form of advertising on Pall Mall Gold you experienced an increase in sales at the rate of ten per cent a month?

A Yes.

Q Is that correct?

A That is correct.

Q What happened when you went to your present form of advertising on Silva Thins?

A Silva Thins is so new in the market place that it is very hard to make a definitive statement. From '68 to '69 it increased from --

Q Excuse me, when --

MR. KRASH: Let him finish.

A It increased from two to 3.4 billion dollars, a percentage change of plus 57 per cent which is indeed very good, all I can say is it seems to --

BY MR. ADLER:

Q Excuse me. I think the testimony has gotten somewhat garbled here. I think it is my fault. When did you go to your new or present form of advertising or Silva thins?

A This is always since the beginning of the advertising of Silva thins. This has been the basic story since the beginning.

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Q In other words, there was no period --

A There was no period when there was something else and then this. This has been it.

Q You testified that part of your reason for using this present campaign on the Fall Ball Gold is to erase the image that the cigarette had of a 43 milligram tar content cigarette.

What in your estimation is damaging about that kind of an image?

A Well, because it is a country I think of some moderation, and you want to feel that you are in the ball park and 43, even though as I pointed out it was under an old method of testing, to the public sounds like 43, and so we wanted to counterbalance that overly high tar picture and get it in the range. And this was the dramatic way of saying it.

Q Are you suggesting that the objectionable thing about the 43 milligram image was part of an esthetic thing, that it did not comport with the temperaments of the American people, that the American people wanted, always liked to be kind of in the middle and were put off by something that would be in the high range.

Is that what you are saying?

A I think with the publicity, the things that were said, that it was important to get it in, the only

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cmc 8 way I can put it, into the ball park figure, which we
2 did, reducing it in the stated figure by a different method,
3 true, from 43, but I think in the public mind what happened
4 was that it got down to a lower level. And was in keeping
5 with the thrust of many people to provide a cigarette
6 that is at least lower in tar than before.

7 Q You don't believe that it was a cigarette that
8 people would associate health hazards with a higher tar
9 content? That wasn't any part of your concern?

10 A No.

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Q Now when you advertise today that Pall Mall Gold is lower in tar than the best selling filter King, as you say, this conveys the impression that it is no longer a high tar cigarette, but is a, say a modest -- I think the word you used was a modest tar content cigarette. Now, again you say that the fact that this may indicate less of a health hazard to some people --

A I didn't say that.

Q You don't believe it does?

A I did not say that at all.

Q Do you believe that a modest tar image conveys to the public less of a health hazard than a high tar image?

A I must honestly tell you I don't know what it conveys. I know there are certain types of cigarettes that you can describe in certain ways, that seem to appeal to the people. And we try to find out what they are, whether it is length or thinness or tar or whatever it is, and when there is an interest in the figures that we put on, and the sales react, then we are pleased.

Q But the health factor really is all to one side, so far as this advertising is concerned? Is that your testimony?

A What I said is that I cannot read the minds of people on this whole subject. I don't know why they do it. I know they do.

Q You know they do what?

A They buy cigarettes in certain tar ranges. We have a lot of people who buy Carlton, which is a 4; we have some who buy Silva Thin, which is 15; we have a good many who buy Pall Mall Gold, which is 19.

Q If you had an advertising slogan that said lower in tar than the best selling Egyptian Cigarette and the best selling Egyptian Cigarette was Fatima, I suppose that might give a misleading impression.

A It sounds very exotic to me.

Q I think Fatima is the highest ranging, is it not, in terms of tar yield?

A I forget whether it was tar and nicotine; it doesn't matter. But Fatima -- and this is one of the troubles with some of these figures, they refer to brands which are extinct or hard to purchase. Fatima used to be a very important product.

Q To answer my question, could it be misleading if an ad were phrased in the form I suggested? Isn't it true that that standing alone would permit you to advertise the second highest tar content cigarette as lower in tar than something else? Wouldn't you agree that without more that would be subject to misinterpretation?

A I just can't visualize the ad you are talking about, I am sorry. Maybe it is getting late. But I don't see comparing anything with Fatima.

Q Well, it would not be meaningful, would it?

A No.

Q But if you use the words lower in tar than something else, that does suggest or it may imply, it would be subject to interpretation, would it not? That this was a cigarette that had relatively low tar, although in fact in the case of suggestion the tar content would be rather high? Isn't that possible?

A I suppose it is possible.

Q So there is a need, is there not, for some qualification on the type of ad that you are running on Pall Mall Golds?

A I don't think this follows at all. I can go through the history once more if you want.

Q No.

A I don't think it follows at all.

Q Let us suppose the best selling filter king were in the 25 milligram range. Then a statement "lower in tar than the best selling filter king brand" would be quite misleading, wouldn't it?

A Let me remind you we did not make this claim when we were at 28; we did not make it when we were at 27; we did not make it at 25; we didn't make it at 22; we made it at 19. And this is when it is --

Q Is 19 a low content range?

A 19 and 20 is meaningful in an effort which we conscientiously made to reduce the tar content of Pall Mall.

Q Isn't the whole subject of tar and nicotine content a fairly complicated one, really?

A In what way? Clinically or what?

Q Clinically, scientifically, medically.

A It has become such a part of the cigarette business that people know what it means and the Federal Trade Commission and the top laboratories such as ours and Reynolds all use the same testing methods. So the meaning of the term and the discovering of how much tar a cigarette has at every point in it is becoming a standard measurement.

Q Is it equally standard and equally well understood what significance that degree or varying degrees of tar content have? Is that an area that is well understood?

A I don't know what you mean by the significance. There are different feelings about it. As you know, the Public Health Service booklets says if you do smoke, it is better to smoke a cigarette that is lower in tar, or to put out your cigarette, so there are these published comments on it. But I do want to repeat that this is not certainly my job to decide all of the emotional reasons. My job is to find out what makes people react and do something about what we say.

Q I want to see if I recall correctly earlier testimony on the sales of Silva Thin. I believe you have testified that

in 1968 sales were \$17 million and in 1969 they were about the same. Is that correct?

A I may have said that. I forget.

Q Would that be about correct?

A I would think they have increased, but I don't know to what extent. I won't know until the close of the year. But I think they will increase this year. Because you see we went, we had an increase from '68 to '69 of 57 percent. So obviously there was an increase.

Q I am sorry. I don't understand that number.

A In looking at the volume, it went from 2 billion cigarettes -- we measure all cigarettes in units -- it went from 2 billion to 3 billion 4, an increase of 57 percent. So I don't know how many new dollars that is so I would like to correct that and say the dollar volume had to be higher with that kind of increase. I don't have the exact sales figures with me.

Q And you will not have them by the end of the week? You won't have them until the close of the year?

A No.

MR. ADLER: I have no further questions.

MR. MONE: No questions.

MR. DODELL: I have a few.

BY MR. DODELL:

Q Mr. Cohen, you mentioned Mr. Hetski transmitted to

1 you letters of October 13, 1969, from Mr. Helffrich to him and
2 a letter of October 22 from Mr. Helffrich to him. Were these
3 transmittals by memorandum or did he physically hand them to
4 you?

5 A They were by memorandum, as I recall.

6 Q If that is the case, then it would seem that such
7 memoranda would fall -- this is to counsel, Mr. Krash. If
8 that is the case, it would seem such memoranda would fall
9 within the schedule of documents that were requested by Mr.
10 Bergson. We make a specific request that they be produced.

11 MR. KRASH: Let me say we will check, but the
12 impression we have is it was just a buck sheet passing it up.

13 MR. DODELL: If it is a buck sheet with any note,
14 it would still fall within the schedule.

15 VOICE: Off the record.

16 (Discussion off the record.)

17 MR. DODELL: Mr. Hetski made an observation or an
18 objection that there are documents falling within this schedule
19 A that may be subject to the attorney-client privilege and that
20 he is not prepared to waive that objection or open that area.

21 MR. HETSKO: I am sorry. That is not what I said.
22 What I am saying is that in the particular memorandum that you
23 are concerned with here, I would have no objection to putting
24 that in and letting you have it, but that is not to be involved
25 as a concession on my part that I am waiving the confidential

relationship that exists with respect to any other papers if there be any. That is what I am saying. It is quite different.

MR. DODELL: In response to that, I would make this observation: On Friday when Mr. Bergson presented this letter, I don't believe counsel for the Plaintiff made any observation as to privilege as to any of the documents. Again this morning no observation --

MR. KRASH: We had no idea what there was. Any competent lawyer given a letter of request of this sort, and any competent lawyer giving the letter knows there may be some documents that are in the privileged category and it doesn't have to be articulated between lawyers.

We have made a good faith effort to produce the documents. If we find there is a document of some sort called for that we haven't produced, we will get it.

Bear in mind we had only one business day to look for these to accommodate you and we have done everything we can. If we have overlooked a document, and we find it, we will give it to you.

MR. DODELL: I will make a specific request: if there are documents that are believed by Plaintiff to fall within the terms of the request, but that Plaintiffs believe are subject to a privilege, we ask these documents be listed so an appropriate time resolution by the court can be invoked as to whether the attorney-client privilege attaches to such document.

MR. KRASH: I will take your request under consideration.
Is there a question?

BY MR. DODELL:

Q Now, when you received the October 13, 1969 --

THE WITNESS: Is this addressed to me now?

BY MR. DODELL:

Q Yes. When you received the October 13, 1969, letter from Mr. Hetsko, did you in turn send it to anybody, either in the company or outside of the company?

A No. I think I testified before that I discussed it with the President, Mr. Heinmann.

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Q Now did you make any memorandum or notes with regard to your conversation with Mr. Heinmann?

A No, I did not.

Q Did you call any of your advertising agencies and discuss the letter with them?

A I cannot recall at what point the advertising agencies were made aware of this communication. But it was shortly after this that they all were aware of it.

Q Was that by memorandum or letter?

A I believe in discussion. It was not, I don't recall writing anything on this subject.

Q Did you make any memoranda or notes with regard to your conversations with the advertising agencies?

A No, I didn't.

Q And as to October 22, 1969, letter, I would like to ask the same questions. First, did you transmit that letter to anybody either in American Brands or outside of American Brands?

A I did not transmit it. I think again everybody was aware of it, there were a lot of copies around and it was discussed on approximately the same basis and in the same way.

Q With Mr. Heinmann?

A Yes.

Q Did you make any memoranda or notes?

A No.

Q Was it discussed with any of your advertising agencies?

A I believe there were discussions on it. I don't recall the nature of them. But everybody read it very soon after it was out.

Q Were any notes or memoranda made with regard to those conversations?

A Not to my knowledge.

Q Did you make any?

A No.

Q Could you tell us the substance of your discussion with Mr. Heinmann concerning the October 13 letter?

A Well, if you would allow me, I think we can lump all of this into one. We obviously read communications --

Q Excuse me.

A Would you let me give you this and if you want to go one by one I will do it. But essentially the discussion was reading it and trying to interpret it, and arriving at the decision that any action to be taken on these would be as a result of a position taken by the networks who are the people we look to to tell us what has to be done with our advertising, which is our only concern.

That would be my statement. Now if you want to go one by one.

Q What was the discussion with regard to the October

13 letter?

A Let me take a look at it.

MR. HAWKE: Do you have an exhibit number you are referring to?

MR. DODELL: These are the batch of documents as to which a list was promised to us but not delivered this morning, so I'm afraid I can't give you a number. It is part of 11 thru 57 that NAB furnished to the Plaintiffs.

MR. KRASH: Are you asking about the letter which came from Mr. Helffrich to Mr. Hetsko?

MR. DODELL: Yes, dated October 13, '69.

MR. KRASH: The letter is dated October 8. That is the FTC letter. Is that what you are asking about?

MR. DODELL: I'm asking about --

MR. KRASH: It came from Mr. Helffrich by cover letter of October 13. You are asking really about a letter transmitted by Mr. Helffrich on October 13, but the transmitted letter is dated October 8. So the conversation would have related to the October 8 letter. Is that what you want to speak about?

BY MR. DODELL:

Q Let's see if the witness can answer my question.

Mr. Cohen, I think you stated that Mr. Hetsko sent you a copy of a letter from Mr. Helffrich to him dated October 13, 1969, and that you had a discussion with him after

13 letter?

A Let me take a look at it.

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BY MR. DODELL:

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you received this letter.

I would like to know what the substance -- excuse me, strike that. Let me go back. You said that you had a discussion with Mr. Heinmann dealing with this letter. I would like to know the substance of your discussion with Mr. Heinmann dealing with this letter.

A Well, the substance of it was that it would be in a 30-second commercial extremely difficult to put the information required, that we didn't know what the interpretation by the networks would be and we would just wait to see what finally came out as the interpretation of these documents.

I think that is the essence of what it was.

Q I think you said I recall discussing this letter with advertising agencies personnel. What was the substance of that conversation.

A Reading it and telling them we would wait and see what came out of the discussions and interpretations.

Q Was any consideration given toward complying with the policy set forth in the October 6 letter?

A Well, there was, it was impossible to say what the policy was. Nobody has said this is what it says and this is what has to be done about it and that is it. There was no, as I repeated many times today, there were still loose ends as of December 17 from the testimony we heard here.

Q Well Mr. Cohen, we are talking about the Commission's

letter. Was there something --

A Well, the Commission's letter was sent to the NAB to be a guideline as it turned out, to the broadcasters.

Q Repeating my question, then, was any consideration toward complying with it?

A No consideration was given in terms of our doing this directly.

Q Now what was the substance of your conversation with Mr. Heinmann relating to the October 22, 1969, letter to Mr. Hetsko?

A This is the letter to Mr. Clements? "This will supplement my letter of October 13" --

Q Yes.

MR. KRASH: May the record show this is Plaintiff's Exhibit 9.

THE WITNESS: Well, the discussion in this was, having read the other document, to find out what really was meant and the key part of this is in the middle of it, "The tar only statement should also contain (audio, video or both), in tandem, the tar and nicotine content of the cigarette."

The number 1 is irrelevant to all of this discussion.

BY MR. DODELL:

Q Was it your --

A So this was again taken as part of the package we

1 were receiving and to put it colloquially we were waiting
2 for the dust to settle, we didn't make any moves on this
3 at all at the moment, we were waiting as I told you to get
4 the final reaction of the people through whom we clear our
5 material, which are the networks.

6 So no action -- this was the net result of that.

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Q In your discussion with Mr. Heiman did either of you express the view that it was not intended by the Code Authority that this be implemented by the stations?

MR. KRASH: Could you read the question back?

{Question read.}

THE WITNESS: We didn't discuss that at all.

BY MR. DODELL:

Q So neither of you considered that this was a binding directive to the networks or to the stations?

A It wasn't binding to us, because we get our advice from the people to whom we submit our material.

Q And neither of you discussed the possibility that the networks might refuse to accept advertising in violation of the Code guidelines?

A We had no idea what the networks would do.

Q Did you think the networks might refuse to follow the guidelines?

A We didn't think about it at all.

Q You didn't think about it at all?

A No.

Q Now let me see if I understand something then. To the best of your recollection, there are no communications to the agency, to the advertising agency, that you wrote or you have seen dealing with these two letters?

A No, none.

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Q None?

A From me, there were none from me.

Q And were there any that you saw?

A None that I saw.

Q And no -- were there any communications within the company that you saw?

A No.

Q Now referring to NAB No. 34, Exhibit 34, which is a memorandum of William V. Moore to Robert J. Heiman and Cyril F. Hetsko dated December 2, 1969, I call your attention to the second sentence of the second paragraph, which says "By direction we were not to approach either the networks or the NAB regarding any changes required, but we are to wait for them to make the first move." Do you know anything about such a direction?

A Well, I think this is part of what I have been saying here, that we were waiting for the networks to say this is what action we are going to take about your commercials.

Q Whose direction is referred to in this memo?

A This would probably be mine. I am just reading it. That would be mine.

Q Did you direct Mr. Moore to that effect? Who did you direct to that effect?

A I would tell Mr. Moore.

Q Did you do that orally or in writing?

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A I believe orally. I am suze orally.

Q Do you recall when that was?

A I don't recall.

Q Was it in October?

A No.

Q It wasn't in October?

A No, I am trying to think. Well, it would have been in October, we are talking here about a number of different things. It would have been done the first time we had word from Mr. Hetsko of these documents.

Q You say it would have been --

A I don't know.

Q You say it would have been?

A I have no record of it and I don't know the date.

Q And you don't have a recollection whether you told Mr. Moore in October or --

A No, I don't remember.

Q So it could have been in October or it could have been in November or it could have been in December?

A It could have been, I simply don't know.

Q Was there any direction by any other person that you received orally to this effect?

A None that I recall, no.

Q Did you receive any in writing?

A No.

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Q Now you mentioned that some people had some problems about whether the information required by the guidelines had to be audio or video or merely video. Was the fact that there were such problems reflected only in oral conversations or were there any writings?

A There was nothing in writing. It was a discussion because the thing hadn't settled down, that is the broadest statement I can make of it.

MR. DODELL: I have nothing further.

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MR. KRASH: Me. Cohen has been on the witness stand for nearly six continuous hours, it is now 7:15 p.m., and he started around 1:30 and I think the witness is entitled to a little rest. I propose that we adjourn for dinner for an hour and we can come back and if we have any questions to ask him we can do that and we can put Mr. Moore on and we can go on into the evening until we finish.

MR. LOEVERING: That is all right. I have two questions I would like to clear up now.

BY MR. LOEVERING:

Q It is a matter of your prior testimony, Mr. Cohen.

One thing you said all of our marketing is based on results. I take it the results means sales.

A That is correct.

Q By marketing, you mean advertising?

A The whole process, promotion and advertising.

But chiefly advertising.

Q Chiefly advertising?

A Yes, sir.

Q So that your advertising strategy is based on sales?

A Producing results, results means sales.

Q Yes.

A Yes, sir.

Q In these circumstances, I am a little curious as to why you aren't more aware of the sales figures of the

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of the various brands. Isn't this the way you judge your advertising?

A Well, I know them in general terms and let me tell you it is a very broad field. You know when your sales are going up and when they go up, the budget increases because this is almost a constant thing, when your sales go X gross X, the budget grows as much, and when your sales decline, very often the budget is decreased.

The one time this is not constant is in the introduction of a new product, when you have to do investment spending and you might spend at a rate that can't be justified by the sales, but you have to get it launched.

So you over-spend in the first two years of any new product introduction. This is traditional, that you don't start breaking even for a couple of years and then sometimes there is a flash product that makes it quickly, but very often you have to give it that seeding period before. So you don't expect to make immediate profits. And this is true in the cigarette business.

Q You testified that Pall Mall golds had increased ten per cent in sales during the past year. At another point you referred to ten per cent a month.

A Well, at the rate of -- it was the annual rate, but it was not ten per cent every month. I said that wrongly. It was increasing and the net result of 63 was a total of

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cme 3 ten per cent.

 These are sales, and 16 per cent according to
Nelson.

Q In other words, month by month it was increasing
at the rate of ten per cent a year?

A That is correct.

Q That is the testimony with respect to Pall Mall
Golds?

A That is correct.

Q And that is during the year 1969?

A 1969, yes.

MR. LOEVERING: I think that clarifies the
point.

(Short recess.)